No. 05-5224

Supreme Court, U.S.
FILED
DEC 2 4 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Writ Of Certiorari To The Washington Supreme Court

JOINT APPENDIX

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Petition For Certiorari Filed July 8, 2005
Certiorari Granted October 31, 2005

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Order Prohibiting Contact, District Court No. 1, State of Washington, County of Pierce, dated July 6, 2000 3

Information, Superior Court of Washington, King County, filed April 20, 2001 6

Transcript of Tape Recording in Exhibit 2, Superior Court of Washington, King County, dated February 6, 2001 8

Transcript in the Superior Court of Washington, King County, dated August 28, 2001 14

Transcript in the Superior Court of Washington, King County, dated August 29, 2001 20

Transcript in the Superior Court of Washington, King County, dated August 30, 2001 22

Transcript in the Superior Court of Washington, King County, dated September 4, 2001 34

Transcript in the Superior Court of Washington, King County, dated September 5, 2001 57

Judgment and Sentence, Felony, Superior Court of Washington, King County, filed December 17, 2001 83

Opinion, Washington Court of Appeals, filed March 10, 2003 96

Appendix A to WACDL's Brief in the Washington Supreme Court, filed May 10, 2004 112

Opinion, Supreme Court of Washington, decided May 12, 2005, as amended May 31, 2005 116

RELEVANT DOCKET ENTRIES FROM THE COURTS BELOW

Date	Court	Description
4/20/01	King County, WA Superior Court	Information Filed Against Petitioner for Felony Violation of a No-Contact Order
8/28-8/30/01; 9/4-9/5/01	King County, WA Superior Court	Petitioner's Trial
9/6/01	King County, WA Superior Court	Petitioner Found Guilty of Felony Violation of a No-Contact Order
12/14/01	King County, WA Superior Court	Judgment Entered and Petitioner Sentenced to 15 Months in Prison
12/17/01	WA Court of Appeals, Division I	Notice of Appeal Filed by Petitioner
1/13/03	WA Court of Appeals, Division I	Oral Argument Heard
3/10/03	WA Court of Appeals, Division I	Opinion Issued, Petitioner's Conviction and Sentence Affirmed
4/10/03	WA Supreme Court	Petition for Review Filed by Petitioner
9/5/03	WA Supreme Court	Petition for Review Granted
11/19/04	WA Supreme Court	Oral Argument Heard

3/25/04	WA Supreme Court	Order Directing the Parties to Submit Supplemental Briefing in Light of *Crawford v. Washington*, 541 U.S. 36 (2004)
9/14/04	WA Supreme Court	Oral Argument Heard Regarding *Crawford* Issue
5/12/05	WA Supreme Court	Opinion Issued, Petitioner's Conviction and Sentence Affirmed
5/31/05	WA Supreme Court	Order Changing Opinion

STATE EXHIBIT 5

IN THE DISTRICT COURT NO. 1
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,

vs.

ADAIRAN MERTELL DAVIS, Defendant.

No. Y0C010565

ORDER PROHIBITING CONTACT

___While awaiting trial
✓ As a condition of sentence

Race Black Sex M DOB 08/13/65 Height 5'5" Weight 220 Eyes Brown Hair Brown

THIS MATTER having come before the undersigned Judge of the above entitled court, and the court having considered the records and files herein and being fully advised in the premises, Now, Therefore,

IT IS HEREBY ORDERED pursuant to RCW 10.99 and RCW 26.50, that the defendant shall have no contact, directly or indirectly, in person, in writing or by telephone, personally or through any other person with Michele McCottry DOB 5/10/69 until 7/5/02 or until modified or terminated by the court.

WARNINGS TO THE DEFENDANT: Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 10.99 RCW, and chapter 26.50 RCW and will subject a violator to arrest. If the violation of the order prohibiting contact involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands you may be

subject to criminal prosecution in federal court under 18 U.S.C. sections 2261, 2261.A, or 2262.

Any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

Effective immediately, and continuing as long as this order prohibiting contact is in effect, you may not possess a firearm or ammunition. 18 U.S.C. section 922(g)(8). A violation of this federal firearms Jlaw carries a maximum possible penalty of 10 years in prison and a $250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. section 925(a)(1). If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. section 922(g)(9); RCW 9.41.040.

YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. section 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

NOTICE: To the Sheriff of Pierce County, Chief of the Tacoma Police Department and all peace officers:

YOU ARE HEREBY DIRECTED to maintain a record of this Order Prohibiting Contact and enforce its provisions.

PLEASE NOTIFY the Pierce County Prosecuting Attorney's Office, 930 Tacoma Avenue South, Room 109, Tacoma, Washington 98402 (253) 798-7446 if the defendant violates the terms of the Order.

DATED this 6 day of July, 2000.

/s/ Jack [Illegible]
Judge

Presented by:

/s/ [Illegible]
Deputy Prosecuting Attorney

Copy Received:

/s/ Adairan M. Davis
Defendant

_____
Date

SUPERIOR COURT OF WASHINGTON –
FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. ADRIAN MARTELL DAVIS Defendant.	WARRANT ISSUED CHARGE COUNTY $110.00 No. 01-1-02794-4 KNT INFORMATION

(Filed Apr. 20, 2001)

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ADRIAN MARTELL DAVIS of the crime of **Domestic Violence Felony Violation of a Court Order**, committed as follows:

That the defendant ADRIAN MARTELL DAVIS in King County, Washington on or about February 1, 2001, did know of and willfully violate the terms of a court order issued on July 6, 2000 by the Pierce County Superior Court pursuant to RCW chapter 10.99 for the protection of Michelle McCottry by (a) intentionally assaulting the said Michelle McCottry;

Contrary to RCW 26.50.110(1), (4), and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Charles K. Sergis
Charles K. Sergis, WSBA #29364
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Full Text of Tape Recording in Exhibit 2

This is Liz Hennekay of the Valley Communications Center. Today's date is February 6, 2001, and the time is 1340 hours. The following taped incident has been recorded from the Valley Communications master disk of February 1, 2001 at 1154 hours.

911 Operator: 911. Hello, 911.

[unknown] [Hang up] . . . *[unintelligible]*

[new phone call; ringing]

911 Operator: Hello.

Complainant: Hello.

911 Operator: What's going on?

Complainant: He's here jumpin' on me again.

911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

Complainant: I'm in a house.

911 Operator: Are there any weapons?

Complainant: No. He's usin' his fists.

911 Operator: Okay. Has he been drinking?

Complainant: No.

911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

Complainant: I'm on the line.

911 Operator: Listen to me carefully. Do you know his last name?

Complainant: It's Davis.

911 Operator: Davis? Okay, what's his first name?

Complainant: Adran

911 Operator: What is it?

Complainant: Adrian.

911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

[unintelligible]

911 Operator: Listen, listen. What direction is running?

Complainant: He's in a car.

911 Operator: What car?

Complainant: I don't know.

911 Operator: What color?

Complainant: It's blue or gray or somethin'.

911 Operator: What direction?

Complainant: He's riding up the street.

911 Operator: Okay. What direction?

Complainant: Goin' down, this is a dead-end street.

911 Operator: It's a dead-end street, so he's going out the dead end?

Complainant: Yeah.

911 Operator: Is he alone?

Complainant: No.

911 Operator: How many people in the car with him?

Complainant: I don't know. He just ran out the door after he hit me.

911 Operator: Okay. Do you need an aid car?

Complainant: No, I'm all right.

911 Operator: Okay sweetie.

[redaction]

911 Operator: Stop talking and answer my questions.

Complainant: All right.

911 Operator: Okay. Do you know his birth date?

Complainant: 8/13/65.

911 Operator: Okay, I'm having trouble understanding you.

Complainant: 8/13/65. I've gotta close my door. My . . .

[child's voice in background] [unintelligible]

Child: Hi Daddy.

911 Operator: Hi. Can I talk your mommy?

Child: Yeah.

911 Operator: Okay. Go get mommy. Thank you, sweetie.

Child: *[unintelligible]*

911 Operator: Okay. Go get mommy.

[child's voice in background] [unintelligible]

2nd Child: Hello.

911 Operator: Hi. Where's the grownup in the house.

2nd Child: *[unintelligible]* my mommy.

911 Operator: Where's your mommy. Is she inside or outside the house?

2nd Child: Uh, walking(?).

911 Operator: She's where.

Complainant: Hello.

911 Operator: Hi. We're gonna check the area first, okay? And then they're gonna come talk to you. Is this your ex-husband or a boyfriend?

Complainant: Yes.

911 Operator: Well, which one – ex-husband?

Complainant: Boyfriend.

911 Operator: Okay, sweetie. Did he force his way into the house – or . . .

Complainant: No. I'm movin' today. He said he was comin' to get his stuff. Somebody else came over here, so he tried arguing with me about that. So then I told him, "Look, I gotta go. You gotta go."

911 Operator: Um-hmm.

Complainant: So then he jumped up and started beating me up in front of him. I don't know what he was trying to prove.

911 Operator: Okay, . . .

[radication]

Complainant: . . . I told him not to come.

911 Operator: Okay.

Complainant: I told him over and over.

911 Operator: Okay. Okay. Take a deep breath. I need to find out restraining order, so I need your last name. What is it?

Complainant: M-c-C-o-t-t-r-y.

911 Operator: M-c-C-o-r-t

Complainant: M-c-C-o-t-t-r-y.

911 Operator: Okay. And your first name?

Complainant: Michelle.

911 Operator: Michelle. And your middle initial?

Complainant: I don't have one.

911 Operator: Okay. What's your birth date.

Complainant: 5/10/69.

911 Operator: Okay. Is your door locked?

Complainant: Yes.

911 Operator: Okay.

[redaction]

911 Operator: . . . put that in the call. They're gonna check the area for him first, and then they're gonna come talk to you. Okay.

Complainant: All right.

911 Operator: Okay. Bye-bye.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 28, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[5] THE COURT: All right. The 911 tape – is there an issue concerning the 911 tape? Have you had the opportunity to hear that as yet, Ms. Ramey?

MS. RAMEY: Yes, your Honor. I just had an opportunity to listen to the tape. There are several issues regarding the tape. There's matters that are detrimental to the defendant and it should be excluded under the rules of evidence.

THE COURT: All right. So it sounds like in your view then we would have a hearing on whether or not the

911 tape is admissible as an excited utterance or on some other ground.

MS. RAMEY: Well, your Honor, I have no problem with the 911 tape or even the foundation for the tape.

The problem is that in the tape there are statements made by the caller relating to prior contacts by the police with Mr. Davis.

And I believe that they would be extremely prejudicial to him if the jury were to hear those statements.

[6] THE COURT: All right, Ms. Gaines do you have an indication on what the State's position is on that concern?

MS. GAINES: And I understand what her concern is and as I mentioned to Ms. Ramey I too concur that there are some statements in there that we're going to have to redact out. The tape is approximately five minutes long?

MS. RAMEY: Five minutes.

MS. GAINES: If the Court wants to take five minutes to listen to it we can probably resolve this and then recess for the day.

THE COURT: What I would suggest is this, I mean if Counsel can agree what will be played then I don't need to involve myself.

So perhaps you should see whether you can agree to redactions, and we can make the record clear that that is exactly what has occurred.

If for the record do you think it's useful for that tape to be played and made part of the record we can do that by playing it through our system here.

But I don't think that's necessary because you can get a copy admitted and then also a redacted version. So unless there's a need for rulings – so I thought I'd wait and see if there's a dispute.

If you cannot agree then sure, I would listen to argument from Ms. Ramey and make decisions as to how it should [7] be redacted.

MS. GAINES: All right. Ms. Ramey can do that this afternoon. And I think then – and I just want to make something – my understanding clear. It's my understanding then, Ms. Ramey, that you're not objecting to the authenticity of it, it's just that we need to discuss redacting portions of it?

MS. RAMEY: That's correct.

MS. GAINES: And you don't have a problem with it being admitted as an excited utterance as long as we redact it?

MS. RAMEY: According to the rules of evidence, a 911 tape comes in as an excited utterance as an exception to the hearsay rule. The issue is whether or not everything comes in if it's more prejudicial than probative.

THE COURT: All right. The Court is anticipating there may not be any disagreement here. It sounds like – I think you're making the correct approach there.

The record will indicate though, as I understand, that the defense will not be objecting to the authenticity of the tape.

It will not be necessary for the State to call Liz Haniky to testify exactly, you know, how the tape was made and that sort of thing –

MS. RAMEY: That's correct, your Honor.

THE COURT: And there is not a general objection [8] to the admissibility of the tape, but the defense reserves the right to request redactions in the event there's not agreement with the State.

MS. RAMEY: That's correct.

THE COURT: All right. I think that's a fair way to indicate our progress as far as that is concerned.

Are there – I'm just skimming this – I can't recall, is the State seeking the admission of any other statements as excited utterances other than what may be on the 911 tape?

MS. GAINES: Yes. There were statements made to the investigating officers by the victim. And it would be the State's approach that we could deal with that at the time during trial.

I mean obviously I lay the proper foundation and then we could deal with it at trial rather than having an actual hearing – pretrial hearing – in that matter if that is okay with Ms. Ramey and the Court.

THE COURT: Ms. Ramey, what's your view toward this issue?

MS. RAMEY: Well, your Honor, my understanding is that Michelle McCottry is going to be here. There was some issue as to whether or not she was going to be here, and the State indicated that they could prove their case without Ms. McCottry.

I think the issue becomes what is an excited utterance [9] as an exception to the hearsay rule? If she's here to testify she can testify.

The officer can testify as to what he saw and any excited utterances and what he, you know, the report in general.

THE COURT: Well, again, what I am trying to determine is whether there's a need either pretrial or perhaps during the trial for there to be a hearing outside of the presence of the jury so that the Court can rule whether or not statements made to the officer would qualify as excited utterances.

Counsel are more familiar with this than I am. It may be that what you're saying to the Court is that you don't have any objection to the officer testifying to what she said to him when she first encountered him on the assumption that she's testifying, but I don't know if that's strictly the proper analysis. What is your position?

MS. RAMEY: Well, your Honor first of all we want to make sure that she is going to testify, and I presume she'll be your first witness?

MS. GAINES: And that is my understanding that she will be present. When I spoke to her last night and this morning she indicated that she would be here for trial.

MS. RAMEY: So she would be able to testify and he would then be able to testify because she would be subject to cross-examination so I don't think we have an issue if she [10] testifies.

THE COURT: All right. I guess the way to handle this then is that we're anticipating that Ms. McCottry will be the first witness.

MS. GAINES: Yes.

THE COURT: And that at the point that the State calls the officer in question I guess that would be the point if the defense had any issue that they wanted to bring to the Court's attention.

That's when you should do it so that I would have the opportunity if persuaded or appropriate to conduct a hearing outside the presence of the jury.

MS. RAMEY: That's correct.

THE COURT: But you may be indicating that you do not think it will be necessary depending upon the testimony that you hear previously. So, that issue for the time being is reserved.

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 29, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[50] MS. RAMEY: The other is the motion to exclude 404b, ER404b, evidence any prior bad acts. There's issues, at least, that can be combined with this number five motion of mine to sanitize the tape.

I presume that the tape has been sanitized. I presume that the reference to the incident two days before [illegible]r incident has been excluded from the tape. And I don't know of any other 404b testimony –

THE COURT: So, it's a motion moot as far as you know?

[51] MS. RAMEY: Right, I –

THE COURT: There's nothing to indicate the State is intending to present any 404b evidence?

MS. RAMEY: Well, the thing is that I want the prosecutor to caution the witness, Ms. McCottry, about that because the two of them have been in a relationship for a long, long time. And it's possible that something could be blurted out about some prior –

THE COURT: I think that's appropriate and Ms. McCottry should be advised of the redactions made to the 911 tape. It sounds like some agreement has been made in that regard; is that correct?

MS. GAINES: That is correct, your Honor, and yesterday the Court asked us to agree and we did agree on redactions to the 911 tape.

The only redaction that Ms. Ramey asked is that the references to the police just being out there two days prior be removed. That is in the process of being removed at this time.

And then what I would say to Ms. Ramey is that tomorrow morning we'll just take five minutes before we actually go back into session and I'll play the redacted version for her to make sure that it meets with her satisfaction.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

August 30, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[14] MS. GAINES: The other thing that the Court needs to be aware of is that there was a change of events yesterday, and at this time the State would be asking for a recess.

And the Court can deal with this and the way the Court feels – obviously you're the Court – once I explain.

Yesterday as the Court knows I was expecting Ms. McCottry to appear. She did not. The victim's advocate and I did some additional research yesterday afternoon as to why she did not appear.

The victim advocate was able to locate Ms. McCottry [15] late yesterday afternoon, and what the victim relayed to the victim advocate was two things.

One, that she was at Harborview Hospital yesterday afternoon, and this is relayed through a phone message so we still do not have completely all of the details.

The advocate did tell me that she believed that's where Ms. McCottry was because she could hear hospital pages in the background on the voicemail message.

And we don't know the reasons for that or what exactly has happened because we haven't been able to talk to her yet today.

Two, she also relayed a message that she needed to speak with the advocate because she was in fear. And her reasons for her fear were that allegedly there had been a phone contact between herself – we believe it was phone contact, we're not sure if it was phone or personal exactly how the contact occurred yet.

But there was potentially either a phone contact or in person contact, some type of contact between herself and the defendant where the defendant told her that if she appeared in Court his defense attorney was going to make her out to be a liar, and that he would make sure that their children were taken away from her, things of that nature.

Once again, your Honor, these are my words because I haven't exactly spoken to Ms. McCottry to actually verify the [16] exact words that were said.

THE COURT: By whom?

MS. GAINES: By the defendant to Ms. McCottry. With that said this morning – I got that message this morning. I'm in the process of researching it. I've requested the phone records from the jail.

I'm also going to request to see whether or not Ms. McCottry appeared and had contact with the defendant at the jail yesterday.

I know that the Court has lifted the no contact order in this case, but it's my understanding that the no contact order out of Pierce County, which is the order that this particular case is based on, is still in effect.

And then also given that there were allegedly additional threats made I'm asking for a short recess, which basically would be until Tuesday morning, to have additional time to research into this, to talk to Ms. McCottry personally to find out exactly what has occurred, what's going on, why she's at the hospital, and to also get the records from the jail to find out.

Because if that is indeed the case the State will be adding charges of at least a violation of the no contact order assuming, like I said, the Pierce County no contact order is still in effect.

And second of all potentially intimidating a witness [17] if it was in fact true that those threats were made and we can verify that there was some contact between the two.

I know that from the jail there was a phone block put on Ms. McCottry's old phone number. I don't know that there's a phone block on her current phone number. In fact I tend to believe that it very well may not be.

I would ask that the Court authorize an order to the jail blocking any contact from the Regional Justice Center jail to Ms. McCottry's new phone. And I would ask for a short recess in order to investigate this.

I'm very concerned because as I stated to the Court although Ms. McCottry hasn't been excited about participating in this trial she's never indicated that she wouldn't.

She's always been very prompt about appearing when I've asked her to appear, returning my phone calls, returning the advocate's phone calls. She's come into my office and spoken to me several times voluntarily as well as on my request.

So I honestly can say to the Court that I don't think that this is necessarily a stall tactic or anything like that because she's never done anything like this before. She's always been prompt and polite about appearing when requested to do so.

THE COURT: All right, Ms. Ramey, any response to the State's?

[18] MS. RAMEY: Yes, your Honor, we would strenuously object to any delay of this trial. We want to get this case over with as quickly as possible.

I suggest that Ms. McCottry be brought in at the noon hour so that I can talk to her, and can find out what's going on.

Your Honor, Mr. Davis totally denies making any contact. He indicates that there is a block on her phone, that her phone number is the same.

And as far as the representation that she's afraid, he's in custody. I mean it doesn't make any sense.

And as far as statements such as well, his attorney would make her out to be a liar or whatever I simply have not – I don't want to be a part of this. I mean, those are words that are not my words. And Mr. Davis indicates they're not his words either.

And as far as taking kids away, I mean that it just doesn't make any sense. So I would ask that the Court continue with jury selection and have Ms. McCottry available to testify in this case at noon – I mean after lunch, which would be approximately 1:30.

Your Honor, again I want to impress upon the Court that we need to know if she's going to be here or if she's not going to be here. If she's not going to be here we need to know how the State is going to proceed without her.

[19] This is not a situation like in some cases involving domestic violence where there's what is called the Smith affidavit where the person testifies or gives a statement; it's then notarized, and there's a case called Smith that allows that to be brought into evidence.

If Michelle McCottry doesn't testify in this case all the State has is the police officers and the 911 tape, which I believe would be insufficient to get this case to a jury.

So I need to know because I need to voir dire these jurors, you know, asking them about, what about a case involving violation of a no contact order where the person that's alleging the contact isn't here.

THE COURT: The Court notes that Mr. Davis denies any contact. Any objection, if there are additional

numbers for Ms. McCottry, to the Court signing an order including those numbers on the phone block from the RJC?

MS. RAMEY: If there are –

THE COURT: If there are any additional numbers for Ms. McCottry, any objection to the Court signing an order authorizing a phone block from the RJC to numbers of Ms. McCottry?

MS. RAMEY: No, your Honor.

THE COURT: All right. The Court would sign such an order. What is your response to the other request made by the defense?

[20] MS. GAINES: I too understand the defense position of wanting to get this trial started and continue with voir dire.

But I too have concerns because Ms. Ramey is asking me to do something that I just don't have the information to do.

I haven't talked to Ms. McCottry. I don't know what is going on other than what has been relayed to me through the victim advocate through phone messages from Ms. McCottry.

I need additional time to go out with my detective and talk to her and find out what's going on. Like I said, this incident of her not appearing yesterday is out of character for this case.

I've been working with Ms. McCottry since the end of May on this case, and like I said, she has never done

anything like this. That indicates to me that something is very wrong here.

And she's been very honest and frank about things that have happened, and I honestly believe that something has occurred that is causing her great fear. And I need additional time to investigate that and find out what is going on here.

THE COURT: What is your response to Ms. Ramey's contention that she needs to know what's going to happen with Ms. McCottry in order to frame her questions on voir dire?

MS. GAINES: I agree. I mean I too need to know what's going to happen to frame questions because I was [21] proceeding with this case with an understanding that Ms. McCottry would be here.

THE COURT: I'm not sure what the presence or the absence of a witness has to do with whether or not there's some bias on the part of a juror that would not permit them to hear the case.

MS. GAINES: Your Honor, with DV cases – please understand they're not your typical cases, and domestic violence has different connotations to different people.

And as one of the jurors even said yesterday when we were talking something about someone not being present and them changing their story, she said that would make me wonder if they were credible. And if we're going to have an issue I think it's very important for both defense and –

THE COURT: Well, why does it impair voir dire? I mean, can't these questions be asked hypothetically?

Jurors don't need to know one way or the other what's going to happen in this case.

MS. GAINES: They don't need to know, but I think I agree with Ms. Ramey. We need to know as far as what's going on, and just the whole mindset of being able to figure out if jurors are going to have an issue.

Yes, hypothetically could we ask questions one way or the other just to prepare ourselves for anything that could happen? Yes, we could.

[22] But I think that both the defense and State would be in a better position to actually appropriately pick a jury if we knew for certain what was going to happen.

I mean, the other thing is depending – I know the Court had made a ruling about the excited utterances, and there had been some mention of the fact that as long as she testifies. I don't know if Ms. Ramey is going to argue that if she doesn't testify that those statements shouldn't come in.

And if the Court's going to revisit that issue and make a different ruling that's going to impede the State's case and potentially mean that we wouldn't be able to go forward.

There are serious ramifications here, and if that was the case where the Court was going to revisit the Court's ruling about allowing excited utterances in then we would pick a jury.

They would potentially be here over the weekend, and then we'd get back Tuesday morning, and we would be dismissing. There's just a lot of things that have occurred in the last 24 hours that are unusual.

THE COURT: I don't think I affirmatively ruled that I was going to allow, as excited utterances, statements she may have made to the police. We didn't get that far.

As I understand it Ms. Ramey just indicated that she wouldn't have any objection to the statements if she were going to testify. I haven't made a ruling as to those. I've only made a ruling as to the 911 tape.

[23] MS. GAINES: And that's my point.

THE COURT: If there's other statements so far Ms. Ramey is indicating there would be no objection to those statements.

She predicated it on whether or not Ms. McCottry testifies, but I believe that I remarked at the time that it's an independent subject.

It doesn't make any difference whether he testifies or not in my view as to whether or not the statements made to the police qualify as excited utterances, but I've not made any ruling on that.

MS. GAINES: Right. And that's what I'm saying. The Court hasn't made a ruling and the Court – my understanding was the Court was basically reserving that?

THE COURT: There was nothing before the Court. There was no motion being made. There was an indication of no objection in the event Ms. McCottry testified, which may well be a perfectly reasonable trial strategy. I have no way of evaluating that.

But I believe I did indicate at the time, I said well, all right, but I didn't make a ruling. I'm not saying I would not make such a ruling.

And we would have to have the appropriate hearing so I could understand what she said under what circumstances, and hear what the police officers actually say about it, and then I [24] would make a ruling if they qualify as excited utterances.

But I haven't made any ruling. I've just heard from defense that they won't object to statements made to the police officers if she does appear. If she does not appear they may have an objection.

MS. GAINES: And that is exactly my point. And I think that's also Ms. Ramey's point is, is she going to appear? If she's going to appear then I think Ms. Ramey is prepared, as she stated yesterday to go forward, and we can deal with her statements.

If she doesn't appear I think it's – and I don't mean to speak for you, Ms. Ramey – but it's my understanding that you may want to bring that motion, but you want to know whether or not she's going to appear or not appear.

And I can't give you that information because I simply don't know at this point. And I think it's best that Ms. Ramey address that.

THE COURT: Ms. Ramey?

MS. RAMEY: Your Honor, if she doesn't appear I think I have the, basis of what would be a Knapstad motion whereby everybody would agree that this is the evidence and then the Court would decide that given that

evidence is this enough evidence to go to a jury? And then that would be the basis for a motion to dismiss.

I presumed relying on Ms. Gaines' word that the [25] person, Ms. McCottry, was going to be in her office yesterday at 1:00 o'clock. I have spoken in the past to Ms. McCottry several weeks ago – it may even be months ago – and I haven't spoken to her recently.

But I think we need to know without wasting the Court's time, the jury's time whether she's going to be here. And if she's under subpoena she should be here. And if she isn't under subpoena she should be.

And it's possible that if the State wants to proceed by way of a material witness warrant to haul her in they may have to do that. But at this point we need to know. We're in the dark, and it's not fair for the defense to have to proceed in the dark.

THE COURT: All right. The Court at this time will deny the request for a recess. As far as voir dire, it seems to me that Counsel can inquire appropriately as is often done with jury panels in various hypotheticals to determine whether one situation or another would affect their ability to be fair and impartial.

It's a little bit of a gray area because questions are not proper which invite jurors to speculate about what they're verdict might be as certain facts are shown.

But I think that one can, and it appears that both Counsel are agreed, make inquires as to whether they might have some prejudice or bias based upon whether or not a person [26] appears.

It's similar to the inquiry of whether there's some bias or preconceived idea in the event a defendant decides not to testify. The jurors don't know one way or the other what that decision is going to be, but on the other hand inquiry is made in voir dire so that Counsel can make informed decisions about preemptories for either alternative.

It seems to me that I do not delay matters on that issue. If Ms. McCottry in fact does not appear, if there's a motion from the defense that's viable I can certainly consider it at that time.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

September 9 4, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY FOR THE DEFENDANT

* * *

[46] THE COURT: Well, that may be the next thing we will be talking about. Let me make some rulings concerning this excited utterance issue, and then parties will be in a position to determine where they are.

It's my view that the 911 recording does qualify under the excited utterance exception to the hearsay rule. It appears that there may be agreement that some further redaction need be done.

I believe the parties already agreed to this, but I would agree to redact the references to the two days prior incident.

I think that's the area where there was some concern and I felt agreement, but I believe the balance of the tape is admissible as an excited utterance.

I am not persuaded that the statements to the officers qualify as excited utterances. I know that these are difficult, issues. I know there are cases where reports immediately following an assault have been admitted as an excited utterance.

My concern in this particular case although it does appear the officer was there promptly thereafter. In listening to his description of the circumstances and the type of detail that Ms. McCottry was offering I was left really with the feeling that it was more of a narrative of a past event although a very recently past event.

She was most tearful when questioned by the officers. [47] That seemed to provoke a major thing. She had a lot of things on her mind. It's very difficult when we get to the point where the event is over and she's now turning her attention to the care of three children, apparently all quite young two in diapers as the officer indicated, she's got that as a distraction.

She's trying to pack. Her central concern was trying to leave, was trying to pack. This does indicate perhaps some fear or stress. Certainly there can be testimony about her demeanor, and certainly the officer can testify about any observations he made about physical injuries that appeared on Ms. McCottry.

But in terms of her statements she, at this point, was focusing on a lot of things. She's packing; she's dealing with children; she had an argument with Mike; she had an encounter with Mr. Davis, which she alleges was physical.

She was able to describe to the officer a sequence of events, which I probably will not be able to recite with full accuracy, but she was able to explain that he came to her house, that she was involved in an argument with Mike, that he initially sat down on my couch and was holding a child, that Davis then attempted to get into the argument, he then set the child down and rushed at her and struck her.

And again I feel that based upon the totality of the testimony that's given I think that it would be difficult for [48] the Court to decide that all of these statements just automatically come in under the hearsay exception for an excited utterance.

Some of it clearly was referring to other events to the extent that she got into some of the past history as well two days ago, the other report with the officer, and that sort of thing.

She was responding to questions. Those were causing stress. I can't say that these were spontaneously arising out of the immediate aftermath of whatever occurred between her and the defendant so I will not permit Officer Davis to quote her –

MS. GAINES: You mean Officer Jones?

THE COURT: Officer Jones, thank you for the correction. Officer Jones to quote statements that she made describing the event, but certainly he can testify about her demeanor and any other personal observations that he is able to make. The 911 tape, I think, is clearly admissible.

MS. GAINES: Your Honor, one other thing. In regards to her history it wasn't the State's intention to

actually elicit any type of information regarding history of Mr. Davis. In fact we even agree with Ms. Ramey that we took off several sections, but I missed one section that needs to come off.

THE COURT: All right, so that redaction will take it off.

[49] MS. GAINES: Right. And also it wasn't my intention to elicit that information from Officer Jones either. And I guess I would just like a little clarification.

Is the Court ruling that the time frame in which these statements were made was so far removed from the quote-unquote startling event, meaning the allegation that Mr. Davis was present and assaulted Ms. McCottry, that that time frame was so far removed that these statements Ms. McCottry made would not qualify as far as timing being spontaneous?

THE COURT: I don't know if it's productive for me to continue to state rulings. The record ultimately speaks for itself in terms of what the Court heard. But again I would say that certainly this was close in time.

I'm not arguing that it's remote in time, but I'm satisfied under the circumstances that it appears to me that because of the details she was able to offer, because of the attention that she was giving to other matters that the statements made to the officer were more in the nature of a narrative description of a past event to Mark Jones.

And that it was not spontaneously arising out of the alleged recent assault. Her greatest stress seemed to occur in responding to questions.

I have no question that it was reviving some painful and immediate memories, but again I think that the type of detail that she offered it would be improper for the Court, you [50] know, where would one draw the line?

It would be improper for the Court to say this entire narrative of what she says occurred down to details of being on a couch and holding a child and something that happened two days earlier I do not think it would be proper for the Court to just on a wholesale basis say this all constitutes an excited utterance.

I don't think that is the kind of circumstance that that rule addresses. I think it's extremely difficult. It's hearsay, and it's extremely difficult if not impossible for the jury to evaluate the credibility of these statements so there are a number of factors, which have persuaded me that it does not qualify.

MS. GAINES: And your Honor, for the record with all due respect to the Court, reading from tag-ons directly under the excited utterance portion it specifically states, "a statement may qualify as an excited utterance even though it is made in response to a question."

THE COURT: I agree. There's no question. We can probably find a case for every circumstance. And I agree that the mere fact that it was in response to a question would not take it out of the exception, but it certainly is a factor that the Court can consider.

It's a matter of exercise of discretion under this rule in determining whether in the circumstances if this case it [51] qualifies as an excited utterance.

In another case the fact that a question was involved might not remove it, but on the other hand that is part of the context.

And likewise it does not say that everything that's elicited by an investigating officer by questions are excited utterances. So that's my ruling under the circumstances of this case.

I know that both Counsel are strong advocates for their position, but that's the distinct feeling that I had as I listened to the officer that it would just simply would not be a proper application of the hearsay exception for excited utterances to permit this detailed narrative into evidence.

There's a lot of other things that he can certainly testify to in terms of what he personally observed.

MS. GAINES: And one other thing I just wanted for the record to state that that is from tag-ons that in citing State v. Hieb. That's cited as 39 Washington Appellate 273. It's a 1984 case.

THE COURT: I saw the note.

MS. GAINES: I just need to put it for the record.

THE COURT: I appreciate that, and we're looking at the same thing. Reversed on other grounds and 107 Washington 2nd 97.

[52] But again, yes it is not excluded. The fact that questions are asked does not prohibit application of the hearsay exception for excited utterance.

So I am not ruling that the fact that her statements were in response to questions is what takes it outside of

the hearsay exception. But that is part of the context that the Court certainly can consider.

And I believe I've, as well as I can, trial judges of course have to make rulings based on testimony they've just heard. They don't have the luxury that perhaps the Court of Appeals might have of reading the entire record.

But I think the record does support the Court's ruling and would not constitute an abuse of discretion for the Court to decline to admit the narrative descriptions by Ms. McCottry to the officer as excited utterances. I just don't believe that they qualify.

* * *

[59] MS. GAINES: Your Honor, there's a couple things [60] we need to address pretrial before we bring in the jury. First of all, I have made redactions to the 911 tape.

Ms. Ramey heard the redacted 911 tape before the Court took the bench and agreed that it is acceptable to the defense. She also, as previously noted, agreed that it's authentic and so therefore it's admissible.

Second of all –

THE COURT: Is that correct, Ms. Ramey?

MS. RAMEY: Yes, your Honor.

* * *

[102] THE COURT: Oh, I regret – I will trust to your – I had intended that the jury see that, but the record will reflect the State has rested. We will make that record in their presence when they are next in our presence. Ms. Ramey, anything?

MS. RAMEY: Well, your Honor, at this time I would renew my motion to dismiss. This is after the evidence has been put forth by the State. The only evidence is evidence of the 911 call, which somebody purports to be Michelle McCottry, and she accuses Adrian Davis of jumping on her and beating on her.

Your Honor, I have not been able to cross-examine that 911 tape. Obviously Michelle McCottry has either disregarded the subpoena she was served with and has chosen not to come to Court.

And the State has chosen not to compel her to come to Court to tell the jury in person what occurred. If that were the case I would have been able to cross-examine her and possibly raise doubts as to what happened, her state of mind, what, for example, the defendant was wearing on the date of the incident, the circumstances surrounding the incident.

And obviously it would have been my goal to try and prove that the defendant was in fact not there and not in violation of the no contact order. As far as cross-examining [103] the police officers, they were not present when the alleged incidents occurred so cross-examining them was of no benefit.

There was no one in the courtroom that said that Adrian Davis is the one that was there on February 2nd. And we have allegations that are crucial for the felony violation of the no contact order that an assault occurred.

All we have is speculation, and we have a 911 tape. It's possible that this incident occurred several days ago. We don't know. And the date that it's charged is February

1st. So for those reasons we would ask that the Court dismiss this case against Mr. Davis.

THE COURT: All right. Thank you, Ms. Ramey. Ms. Gaines?

MS. GAINES: Your Honor, in a half time motion the Court must view the evidence in the light most favorable to the non-moving party, which in this situation would be the State.

And as such the State believes that I have made a prima facie case to allow this case to go forward. I have testimony from two officers that the injuries they observed on Ms. McCottry as well as the damage to the rocking chair and to the wall were recent.

Officer Jones even indicated that the bruising appeared to be occurring at the time while he was there. Officer Tamanaha has 14 years of experience and also indicated [104] that based on his experience those injuries were recent.

We have a 911 call to the 911 dispatch made at 11:56 a.m. The officers responded to the scene four minutes later at noon. They identified Ms. McCottry.

The testimony has been again that the evidence that they viewed was recent meaning the injuries to her as well as the damage to the house.

Also as far as identification we have a 911 call and tape that identified the defendant as the person who caused the damage and the injuries to Ms. McCottry.

We have the Department of Licensing photo as well as the no contact order, which also contains the same date of birth and description of the defendant.

And we have an officer, Officer Jones, who identified the person in the Department of Licensing photo as matching the description of the person here in Court today, Adrian Davis, the defendant.

We also have a 911 call made by Ms. McCottry at the time of this incident identifying Adrian Davis with the date of birth of August 13th, 1965, the person who was her ex-boyfriend and the subject of a no contact order as the person who assaulted her on February 1st, 2001.

As such it's the State's position that I have made a prima facie case in this case, and this case should proceed to the finder and the trier of fact.

[105] THE COURT: Your reply?

MS. RAMEY: Your Honor, I will just reiterate what I said in my motion. Failure to be able to cross-examine is crucial and is the bedrock of our criminal justice system. And because Mr. Davis cannot confront his accuser he's denied his constitutional rights.

MS. GAINES: And if I may briefly reply to that?

THE COURT: Thank you.

MS. GAINES: Your Honor, under Davis, and that's the case I cited, it is stated in there as well as in numerous other cases that the excited utterance is not a violation of the defendant's constitutional right to confront his accuser.

It specifically states, I believe in Davis, that as long as the person who is relating the declarant's statements is available to the defense for examination then that is all that is necessary.

Here we have Officer Jones who was present. We have the 911 tape that was made and that was allowed in as a business record that's available for the trier of fact to evaluate.

THE COURT: Anything further, Ms. Ramey?

MS. RAMEY: Your Honor, the officer is not available for cross-examination as to what the declarant said because that was excluded by the Court in an earlier ruling. So we're left with the 911 tape, and that cannot be cross-examined.

[106] So the declarant is unavailable for cross-examination and there really is no person that heard this statement. It's just simply a 911 tape and so there is no ability to cross-examine it. And it's extremely prejudicial.

I would further state, your Honor, that in searching through the case law I have been unable to find any case that supports a 911 tape being the basis for a criminal law violation coupled with the responding officers to the scene.

And the reason I haven't been able to find anything is because I believe they don't exist. All of the cases seem to have lots of other corroboration.

MS. GAINES: Your Honor, I point you to, in Tegland's if you have the 2001 edition, does the Court?

THE COURT: Yes.

MS. GAINES: Page 361, the top of it, it says: "Example, admissible in prosecution for assault statements by a witness during the witness's telephone call to the police headquarters were excited utterances.

"The Appellate Court noted that the witness was crying and agitated throughout the conversation and that the call was made contemporaneously with the shooting or shortly thereafter."

And that's State v. Ross at 42nd Washington Appellate 806 1986 case. Obviously I have not had an opportunity to review this, but based on what is stated in Teglund's I believe [107] that that is the situation we're looking at here.

We know the 911 call was made at 11:56. We hear the victim on the tape saying he's running, he's running right now, he's running out the door, he was just here, and so it would seem that that case would apply. And granted I don't have a copy of it – oh, the Court is getting a copy of the case to review.

THE COURT: Did it involve a 911 recording? It probably involved somebody who was able to testify and be cross-examined on having heard the statement alleged to be an excited utterance.

MS. GAINES: And I honestly don't know about that at this time.

THE COURT: What I was also looking for – I am familiar with the comment that you made previously, and I'm just trying to spot the authority for it where there's a case that's indicated that the right of a defendant to cross-examine is adequately preserved if the 911 comes

under the hearsay exception, but the person who heard the statement is available for cross-examination.

Ms. Ramey has raised the issue of here we have a 911 tape with no witness to be cross-examined as to what he or she heard or the circumstances or basically exploring more of the context of these statements. Where in the book do they refer to that?

[108] MS. GAINES: I didn't get that out of the book. That's just based –

THE COURT: Just general?

MS. GAINES: Just general.

THE COURT: I have seen that statement somewhere. It may be included in the hardback text somewhere.

MS. GAINES: The other thing, your Honor, is then that's an objection that actually should have been made at the time that the 911 tape was offered as admissible because by waiting to this point what the defense has done is basically raised an issue that they've already stipulated to.

What should have been done is if that were her point she should have objected to the 911 tape coming in. And it should have been objected to at that time. So that's an untimely objection and an untimely argument.

THE COURT: I think the defense has objected to the 911 tape, but the objection has been overruled based on the excited utterance exception to the hearsay rule.

MS. GAINES: I mean, maybe I misunderstand, but that wasn't my understanding of what her objection was or that she was even objecting.

MS. RAMEY: Your Honor, we were not objecting to the admissibility and the foundation. We were not going to require the person to come in that took the 911 tape that would authenticate it. That's different than the contents of it. We [109] have always continued to object to the contents of it.

And the other issue is that we did not know that Ms. McCottry was not going to testify. At the beginning of this case we were under the impression that she was going to testify.

And she was supposed to be here on the 28th at 1:00 o'clock in the afternoon. She didn't appear, and it was not until Friday of last week when I ran into the prosecutor on another case that she indicated that Ms. McCottry was not going to be here. So that if Ms. McCottry was here to testify then I would have probably not an objection to the 911 tape.

MS. GAINES: Your Honor, that still goes to – what she's arguing is that the 911 tape is inadmissible and the Court has ruled all along that it was admissible and so what she's asking the Court to do is to reconsider the Court's own rulings.

And if the Court is going to do that and it's going to rule adversely to the State then the State should be afforded an opportunity to re-open its case and present such witness if need be because what should have occurred –

THE COURT: A witness to do what?

MS. GAINES: Huh?

THE COURT: Which type of witness?

MS. GAINES: I mean if the Court is ruling that because we don't have the 911 operator to actually come in and say –

[110] THE COURT: That would not be the issue.

MS. GAINES: Okay.

THE COURT: Give me just a minute. All right.

MS. GAINES: Your Honor, can I just briefly make a couple more comments?

THE COURT: Yes, you may.

MS. GAINES: Your Honor, the other thing that the Court should consider is the declarant in this situation is the 911 tape. It's one of the reasons why the Court let it in because it is clear that the victim is crying on the tape. She's hysterical.

You can hear her excitedness when she's relaying the incidents to the 911 operator. It obviously is made close in time to the event because the officers arrive at 12:00 o'clock noon. The tape was made at 11:56.

She even states in the tape a present sense impression – he is running. That's a present sense impression when she describes that he's running down the street, it's a one-way street, and that he's getting into a car.

The jury can clearly evaluate the victim's demeanor on this tape, and they are free to do so and to assess whether or not this tape is credible based on what the jury has heard.

They're the trier of fact and that is their job to so [sic] in this type of situation. They can find that this 911 tape is not credible because they don't believe that the victim's [111] demeanor is such that would indicate that she's credible. That's for the trier of fact to do.

THE COURT: All right, anything further, Ms. Ramey?

MS. RAMEY: Your Honor, if that's the case then why even bother subpoenaing witnesses? Let's just try everything by 911 and that's the end of it.

THE COURT: All right, thank you. I think the following is the appropriate thing for the Court to do. I, unlike Counsel, have now had the opportunity to be the one most recent to read the case referenced by the State for the proposition that the phone call to police headquarters, which it turns out was a 911 call, is an excited utterance – State versus Ross, 42 Washington App, 206.

The interesting thing about that case when you read it is that one issue, of course, was the question of whether it was a business record in that case as in this case there's no challenge to the 911 tape as a business record.

The defense is conceding the authenticity of the 911 tape, and does not doubt the ability of the State to prove that it's an authentic business record.

The next issue is excited utterance. The Court has ruled consistent with State versus Ross that the statements made by the out-of-Court declarant, which is clearly Michelle McCottry, are excited utterances.

[112] The defense objected to that ruling, but the Court ruled that the 911 tape does qualify as an excited

utterance as in Ross. The Court's brief discussion of this is similar to what the State just referenced in the Teglund book.

At page 809 of the opinion, 42 Washington App, the Court simply says, This exception to the hearsay rule admits statements made while the declarant is under the exciting influence of an event where circumstances show no opportunity of deliberation or fabrication."

Omitting a citation the Court goes on the [sic] say, "It is apparent in listening to the tape that statements made by Ellis," who was the complaining witness in that case, I'm adding ", [sic] fall within the rule."

Continuing to quote the Court, "she is crying and agitated throughout the recorded conversation. And the phone call was contemporaneously made with the shooting or shortly thereafter."

They then proceed to a third issue, which is what the Court now recognizes the defense is raising, and that is the question of whether or not admission of the – even if the 911 tape does qualify as an excited utterance and even if the authenticity is not challenged.

The question is then whether or not where that is the only evidence placing the defendant at the scene whether or not the defendant has been, if the Court proceeds with the trial, is [113] deprived of his right of confrontation.

The Court in part states in beginning its discussion of the confrontation clause says, "Though Ellis' statements would be admissible in a civil case as an excited utterance they must pass muster under the confrontation clause to be admissible in a criminal case."

And the Court then goes on to say that, as far as I can tell in skimming it, the Court is adopting a rule in Ohio versus Roberts, which is a United States Supreme Court opinion at 4408 US 56 1980, which says first that the Court requires that the State either produce the out-of-Court declarant or demonstrate the declarant's unavailability. And second, the statement must bear adequate indicia of reliability.

Thinking aloud, there may be some indicia of reliability because it's a 911 tape and qualifies as an excited utterance. That's the whole basis for the exception of the hearsay rule.

But of greater concern is the apparent rule that the State must either produce the out-of-Court declarant or demonstrate unavailability. They go on in discussion in that particular case to say, "The State was aware that Ellis was available, but reluctant to testify.

"The State did not call her as a witness, but instead attempted to present her version of events by the recorded conversation on the tape. The trial Court reserved its ruling [114] at that time and did not admit the 911 tape until the following day when Ellis was not present to testify.

"The record is silent as to why Ellis did not appear on the second day of trial or what attempts were made to locate her. With this record this Court cannot find that the State made a good faith effort to procure Ellis to testify."

The other thing that was a problem in this case though even if you overcome the confrontation clause, but it would offer a possible means of distinguishing this case, which ended up resulting in a reversal.

But I think the other thing that offended the Court of Appeals in this case in the last part of the case they discuss yet another issue, which we frequently conduct and that was the jury room use of the 911 tape.

And in this particular case the trial Court did not retain any control over the number of times a jury would listen to the tape, simply allowed the jurors to have the tape and the tape machine, and they played it as many times as they wished.

I think that probably was influential to the Court as they were going along with the issues in that particular case, but they do conclude that the defendant Ross' right under the United States and State's Constitutions to confront witnesses was violated.

It would appear that the fairest thing the Court should do at this point is reserve its ruling to give Counsel [115] the opportunity to read the same case the Court has to determine if there are other authorities that might persuade this Court that the defense motion should be denied.

But I am interpreting the defense motion as a motion to dismiss under the confrontation clause. Is that a fair characterization, Ms. Ramey at this point?

MS. RAMEY: That's correct, your Honor.

THE COURT: The other thing that I would mention however, that I would also like addressed and that is the question of it may be enough if the tape comes in, but I have been independently inquiring myself what evidence there is of willful action on the part of Mr. Davis given the state of this record.

The Court certainly has to take responsibility for the ruling it made prohibiting the officer from recounting other statements that were offered as excited utterances, but even if the Court permitted that it would appear this motion would still be here under the confrontation clause.

But I am interested if there is a case which might not help the State given the Court's ruling, but if there is a case that says that the confrontation clause is satisfied if the person who heard the statement of the out-of-Court declarant, namely the police officer, is availably cross-examined about that.

And that might be of assistance because it would [116] certainly bring into clear focus the effect of the Court's ruling in not permitting the officer to testify about statements that he heard and it may be that – and as I say at the moment I would not anticipate changing my ruling.

But I think that that authority would be helpful for the Court in understanding and I don't know whether it would be of any assistance to the State under the present posture.

Thinking aloud, it may be from the standpoint of the confrontation clause if the Court had been satisfied that the statements to the officer qualify as excited utterances it may have been that the appropriate ruling would have been to exclude the 911 tape as violative of the confrontation clause, but permit the statements to the officer under the theory, if there is a case that says this, that the officer is available for cross-examination as the hearer of these out-of-Court statements.

Ross itself suggests that the focus is on the declarant not someone else, namely Ms. McCottry, and that the

declarant must either be produced or be proven to be unavailable.

MS. GAINES: And your Honor, I have information that I can tell the Court about that right now. That's exactly the Davis case, and that's what I was explaining to the Court earlier that under Davis and the cases that follow thereafter – and Davis is a 2000 case. The Ross case is a 1986 case.

[117] It specifically says that the confrontation clause has been satisfied when the person who heard the statements of the delcarant, meaning in this situation Ms. McCottry, is present for the defendant to cross-examine. And that's exactly what we have here.

THE COURT: Well, what's the cite to Davis again?

MS. GAINES: It's 141 Washington Second, 798, and it's a 2000 case.

THE COURT: And what you're saying is that Davis says that the confrontation clause is satisfied when the officer who heard the excited utterance is available to testify?

MS. GAINES: Exactly.

THE COURT: But with the Court's ruling then without – well, then the question is when all we have is the 911 tape is the defense correct?

MS. GAINES: And that –

THE COURT: And therefore the only relief would be for the Court to reconsider its ruling, which I'm not inclined to do.

MS. GAINES: And, your Honor, that's something that once again I'll need to actually evaluate. And once again to sort of address your question of the willfulness, and I understand at issue here is the 911 tape, which I understand the Court is going to take until the morning to research.

The willfulness is once again cured by the statement [118] on the 911 tape. Ms. McCottry specifically says, I told him not to come here. We also know that according to her statement on the 911 tape he was present. We know that there's a no contact order telling him he's not to have contact.

THE COURT: I'm less concerned about that issue, but I was just acknowledging that it was a thought I had. I think the more serious issue is the confrontation clause, and I certainly would appreciate candid advice.

I just thought it was fair to both Counsel to have the opportunity to reflect upon this and look at Davis, look at Ross, look at anything else that there is.

And certainly I do not feel as 1 sit here now that even if I were to understand that my ruling basically left the State with nowhere to go because of the confrontation issue without indicating that I would likely change my mind obviously it may be the State has to say that's our only redress at this point.

I have a responsibility to make sure there's been a fair trial to both sides in this case. I don't think that I will change my mind on that, but I think intellectually it would be good for the record to indicate what the situation is and whether there's a dispute or not.

It may be that the State will concede that if all they have is the 911 tape the defense motion is proper because of the confrontation clause issue. That's where we are, I believe. [119] All right, we'll see you in the morning. Are Counsel available at 8:30 or are you both somewhere else?

* * *

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN DAVIS, Defendant.	)	No. 01-1-02794-4 KNT COA No. 49679-4

PROCEEDINGS BEFORE
THE HONORABLE JAY V. WHITE

September 5, 2001
Kent, Washington

NICOLE GAINES, ATTORNEY FOR THE PLAINTIFF

MARY ELLEN RAMEY, ATTORNEY
FOR THE DEFENDANT

SEATTLE, WASHINGTON; WEDNESDAY,
SEPTEMBER 5, 2001

8:47 a.m.

-o0o-

[2] PROCEEDINGS

THE COURT: I will just indicate briefly that I did do some work on the issue that we were discussing toward the end of yesterday, and it does appear that there's been some significant development in the law since State versus Ross and the Court of Appeals decision was decided.

Probably the most orderly way for me to proceed is to allow Counsel the opportunity to have a few minutes to supplement their argument of yesterday and then I anticipate being able to make a ruling on the motion to dismiss.

Since it's Ms. Ramey's motion, what did you want to add to the record as far as this motion?

MS. RAMEY: Your Honor, I too did some research. I reviewed the Ross case and obviously the Ross case discusses the confrontation clause and gives the criteria and also points us to the Ohio versus Roberts US Supreme Court case.

I think that the Ohio versus Roberts case talks about why the confrontation clause is so important, but I think what we have to look at in the Ohio versus Roberts case is what evidence was admitted in.

In that jurisdiction they have what is called a preliminary hearing process similar to the one that I was [3] accustomed to when I was a prosecutor in Cook County, Illinois.

We would have a person come up in the preliminary hearing court and give a brief summary, enough to establish probably [sic] cause, and the defense attorney at that point would be allowed to cross-examine the witness.

In our situation we have only a 911 tape. Obviously there is no opportunity to cross-examine the person that's complaining. As far as the Davis case, which is supposedly the update from the Ross case, I think that that, even though it addresses the confrontation clause, would not be applicable in this case because in that case it was a capital murder case.

There was lots of other evidence. This was the woman that was drowned in the bathtub. There was forensic evidence. There was shoe print evidence. There was admissions by the defendant after the fact all of which were significant evidence. And then this supposedly excited utterance by a co-defendant was allowed in.

I think that in this case we have to look at what's before the Court. All we have is a 911 tape and officers going to the scene testifying to their observations.

Mr. Davis has the constitutional right to have the testimony of this witness tested. One of the criteria for allowing this in without confrontation is for the State to demonstrate the unavailability of the witness.

In this case – I'm not sure if it was the Ross case [4] or the Roberts case there was a material witness warrant issued for the person to come to Court.

It's expected that when somebody initiates a 911 call that they're going to follow through. And if they choose not to follow through voluntarily, and the State agrees with that position of them not following through for whatever reason then the State just doesn't have a case.

And we have to look at everything in this case to determine whether or not my client's constitutional rights would be violated if this case were allowed to go to a jury.

I don't think a jury would convict based on the evidence that's before the Court however I can never say "never" because I've been in this business too long, and I know that juries never fail to surprise me as to what they will and will not convict on.

So I am very nervous about this case going to the jury. My client faces substantial loss of liberty including a trip to the penitentiary if he's convicted.

And I think that the Court needs to fully examine what's before it and make a determination that the confrontation clause is violated if this case is allowed to go to the jury as is.

THE COURT: Thank you. Ms. Gaines?

MS. GAINES: Your Honor, I too did research last night and reviewed quite a few cases. And I would point the [5] Court's attention to the fact that there are cases out there that say that the confrontation clause is not violated if the information that is allowed into the record falls under the excited utterance rule, which is what we have here.

With that said I also would like to point out to the Court that the Court's concern about the Ross decision and whether or not we have to either produce the victim or prove that she was unavailable.

With that said I'd just like to draw the Court's attention to what we have repeatedly said on this record, and that is one that Ms. McCottry has chosen to absent herself from these proceedings. She received a subpoena. My detective –

THE COURT: She, pardon?

MS. GAINES: She did receive a subpoena. She was subpoenaed to come to Court. She knew about the Court date. I had contact with her up until Thursday of last week.

In fact the last day I spoke with her was on the eve of August 29th, I believe, maybe the 28th. I correct that, the 28th, I believe, either the 28th or the 29th.

At that time she had anticipated coming and had told me that she would be present for Court, but she failed to appear, and I brought to the Court's attention it appears that she somehow was persuaded to absent herself from these proceedings.

We still haven't been able to confirm or deny that [6] because she had literally absented herself from these proceedings. I have with me Detective Gene Murray who is here who can further supplement the record about the efforts the State has made to locate Ms. McCottry.

We have tried to contact her though a reverse directory, but her phone number does not produce an address. We went out to her last known location, and the person who was living there indicated they did not know of her, did not know where she had moved.

I have spoken to our victim advocate, and she doesn't have an address for Ms. McCottry. We know this woman is around. We have checked with the Department of Licensing records, and there is not address for her.

We know this woman is around. We have no idea where this woman is located. She is now refusing to return anyone's phone calls. We have no way of getting in touch with this woman.

And with that said, yes, we've chosen not to issue a material witness warrant, but even if we issued the material witness warrant we have to know where she is to pick her up. We don't know where she is.

We know that she's in this area, but we have no ability to locate her, and have done everything within the State's control to locate her and have not been able to.

Detective Gene Murray is here if the Court has any [7] questions of him as to what steps he has taken to try and locate her. I'm giving you an offer of proof of the things that I know he's done and if the Court would like to inquire he is present to do so.

So she is not available under the rules of evidence and the State has exercised diligence in trying to obtain her presence here.

And for that reason its the State's position that under the case law, the old case law as well as the recent case law, that the defendant's due process rights of confrontation have not been violated.

THE COURT: Thank you. Any reply, Ms. Ramey? It's not required. I just want to extend that to you.

MS. RAMEY: No, your Honor. I think the Court knows our position.

THE COURT: All right. There are a number of decisions that have been made by both the Court of Appeals and the Supreme Court since the Division 1 opinion in State versus Ross at 42 Washington App 806, which is a 1986 decision.

Perhaps the most significant development in terms of the language in Ross that appears to require the State to show, along the lines that Ms. Gaines has offered to do, that the witness is legally unavailable, that due diligence has been applied to locate her, that she simply cannot or reasonably be made to appear.

[8]That language seems to be superseded by a number of cases, State versus Polomo at 113 Washington 2nd 789, a 1989 decision written by Justice Smith. This is the same justice who wrote Davis.

Stated at the beginning of that particular opinion that, "The significant question is whether testimony of a witness relating an out-of-Court statement by a person not present in Court under the excited utterance exception requires proof of unavailability of the declarant."

And right at the beginning of the opinion the Court states that, "The simple answer to the question is that the traditional excited utterance exception to the hearsay rule sufficiently meets the test of reliability to overcome the constitutional confrontation objection."

And that case did not involve a 911 tape, but it did involve statements witnessed by the arresting officer immediately upon coming on the scene of an attempted rape actually in progress.

The Court specifically indicated at the end that they had referred to an unpublished decision of the Court of Appeals, Division 1, which probably was following the Ross rule.

And it was the opinion in Polomo itself. The original Court of Appeals opinion in Polomo said that, "The admission of the out-of-Court hearsay statement without showing a good faith effort to produce the witness violated the petitioner's right to [9] confrontation."

The Supreme Court decision specifically rejects that holding. They then go on to say that the Court of Appeals concluded the error was harmless under the overwhelming tainted evidence test and affirmed the conviction.

We don't have that in this case as an alternate ground. I think it's clear as the defense points out that the 911 tape and the testimony of the officer is really all that's before the jury.

There is not other evidence that if we assume for the sake of the argument, "untainted evidence," that would result overwhelmingly in a finding of guilt.

The Supreme Court remarks at the end that at the end they do agree that there could be – they say, even assuming that there's a violation of the defendant's right to confrontation under the circumstances of Polomo, they said it would be excusable as harmless error, but then again specifically says, "We affirm the Court of Appeals, but not on the ground of harmless error.

"The Sixth Amendment does not require a showing of unavailability of the declarant for admission of an out-of-Court statement under the excited utterance exception of the hearsay rule."

The theory is that this is a so-called "firmly rooted exception," that it has strong indicia of liability. In the [10] same opinion, Polomo, makes the comment that one of the theories of allowing the evidence rule – the excited utterance to satisfy –

The reason for the ruling that the admission of excited utterance does not violate a defendant's right to confrontation of witnesses is the Court also comments, "The theory of the exception itself, mainly hearsay excited utterance, which vouches for its reliability is that the stress of the events suppresses the reflective faculties of the declarant with the result that the utterances are sincere and spontaneous."

They actually go on to say, "The out-of-Court declaration is considered even more reliable than what is likely to be elicited from the same person testifying under oath in Court."

Other cases to the same effect, State versus Davis has similar language and comments, page 846, "A hearsay statement that qualifies for admission under a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability."

State versus Ackerman, which is a Court of Appeals decision from Division 3 at 90 Washington App 477, 1998 includes this discussion, "As originally interpreted the federal confrontation clause required the State to either produce the declarant or show that the declarant was unavailable as a [11] witness. Once a witness was shown to be unavailable the State also had to show the witness' statements bore adequate indicia of reliability to be admissible."

But in White versus Illinois 502 US 346, which is a 1992 decision, the Supreme Court held that a declarant's hearsay statement may be admissible even if the declarant is available as a witness but does not testify as long as the statement's reliability is demonstrated.

"When the proffered testimony has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule or is supported by a showing of particularized guarantees of trustworthiness the confrontation clause is satisfied."

Teglund also has an essay – he's the one who started us down this trail by causing the Court to look at State

versus Ross in the first place, which Teglund cites just for the proposition of what constitutes an excited utterance.

I went over and picked it up off the shelf and found all this discussion about the confrontation clause, which I think has clearly been – I did not jeopardize Ross, and I don't know if Counsel did, no one appears to.

I don't know if they ever specifically distinguish or overrule or reject Ross? It may be sitting there, but it makes no sense in light of Polomo.

MS. GAINES: I did, your Honor, I did actually [12] jeopardize Ross, and that was the problem I ran into. I did find Polomo and the other cases that you mentioned, but none of them, as the Court has noted, specifically say that they overrule Ross. You have to come to that legally in reading the other cases.

THE COURT: The closest thing is Polomo itself, which refers to an unpublished opinion in the Court of Appeals in Division 1 where one could speculate, probably with a fair degree of educated guess, that the reason that the Court of Appeals did not publish the opinion is they thought it was self evident after their decision in Ross.

The Supreme Court specifically refers to that and says no. Ohio versus Roberts is distinguished – it may be in Polomo or one of the others.

Ohio versus Roberts involved a specific Ohio statute that required a showing of unavailability of a witness and it also dealt with prior testimony, not an admission of prior testimony as Ms. Ramey is indicating apparently for a preliminary hearing.

It was not related to an excited utterance, which is under the deeply rooted exception language that the Court's have now approved repeatedly.

And there is actually a similar rule, evidence rule 804, and the various discussions in 804 all require a showing of unavailability.

[13] And what I was getting to to conclude this – and Teglund includes an essay also about the confrontation cl ause starting at page 415 of the 2001 edition. It talks about White versus Illinois and complains that the Courts, as he puts it, "Have simply been working their way through the list of hearsay exceptions deciding on a one-at-a-time basis whether the traditional requirement of unavailability continues to apply.

"The Courts including the United States Supreme Court in White versus Illinois have offered little guidance for the determining whether the requirement of unavailability should apply under other hearsay exceptions, exceptions which have not yet been addressed by the appellate courts."

But he goes on and says, "Predictions are always hazardous, but the trend seems to be toward the view that as far as unavailability is concerned the Sixth Amendment requires no more than the codified exceptions to the hearsay rules thus a finding of unavailability is required only when a finding of unavailability is likewise required under the applicable hearsay exception.

"In practical terms if the prosecution is relying upon one of the hearsay exceptions in Rule 804, which require finding of unavailability the necessary finding of unavailability likewise satisfies the Sixth Amendment.

"By contrast if the prosecution is relying upon one of the hearsay exceptions in Rule 803," which is what is involved [14] in our case, "which apply regardless of the declarant's availability no finding of unavailability is required by the Sixth Amendment."

So it appears that it's now pretty well settled in this state particularly in Polomo, which I don't think could be any more explicit, that because the statement in this case does involve an excited utterance admitted by the Court, the 911 tape, that the defendant's constitutional right to confrontation of witnesses under both the federal and state constitutions is not violated.

Under those circumstances the Court will deny the defense motion to dismiss.

* * *

[40] All right. Thank you. Ladies and gentlemen, at this time please turn your attention to Nicole Gaines who will deliver closing argument on behalf of the State of Washington. Ms. Gaines?

MS. GAINES: Thank you, your Honor. When we finally started this trial yesterday I told you that this was a case about the defendant breaking the law.

You have heard two people talk about how that occurred. Now it is your turn to put those two witnesses and Ms. McCottry's taped statement to the test and put all of this together.

I would like to take this opportunity to work with you through those jury instructions very briefly and help explain why Adrian Davis is guilty of the crime of violation of a Court order.

The Court has read to you the "to convict" instruction, and he's explained to you what I have to show in order for you to convict Mr. Davis of violation of a Court order. Several of these things are not really in dispute.

First of all, the fact that this occurred in King [41] County is not an issue because the officer testified that he did respond to the address that was in Kent, Washington, which is in King County, and that the assault, according to Ms. McCottry, occurred at her home, which is in King County.

The other thing is the date of February 1st. Both officers testified that it was February 1st that they arrived at Ms. McCottry's home.

So let's talk about the defendant willfully having contact with Ms. McCottry. Let's break this up and first talk about the defendant, Adrian Davis. How do we know that it was Adrian Davis that was there that day?

First of all, we have a 911 tape with Ms. McCottry that is made at 11:56 a.m. On the tape you hear her voice. She's scared. She's frightened. She's crying. She identifies herself. She identifies Mr. Davis.

She even gives Mr. Davis' birth date, and that birth date is the same date of birth that is on this no contact order, and you will have an opportunity to take this back to the jury room with you to review. It is also on the Department of Licensing photo.

This is the same man identified in Court by the officer. That is how we place Mr. Davis at the crime and know that it is Mr. Davis, and the same Mr. Davis that is subject to this no contact order.

"Willfully." We know that this crime took place at [42] Ms. McCottry's home. On the 911 tape we hear her say I told him not to come. We know that she said that he was there. He had to get to her home.

He knew that there was a no contact order. How do we know that he knew there was a no contact order? Because that is his signature that is right there, and there is nothing to contest that that is his signature that is on this no contact order.

So he knew that there was a no contact order. He knew he wasn't supposed to be at her home. He still was at her home. That takes care of "willfully."

"Had contact." It is the same thing. He was at her home and an assault occurred on Michelle McCottry. We have Ms. McCottry on the 911 tape identifying herself as Michelle McCottry.

She gives her name. She corrects the operator in the spelling of it. We have a DOL photo and an officer's identification of Ms. McCottry saying that that is her.

Ms. McCottry. Now, granted the photos taken by the officer don't show her face, but the officers spent 30 to 40 minutes with her and they identified this as being the same Michelle McCottry that they spoke to that day. The same Michelle McCottry that they took photographs of her injuries.

"Prohibited by a no contact order." Read this no contact order. Read it closely. You will see that in the print [43] it says that he is to have no contact.

It also says that he is not to assault her, and if he assaults her, meaning Ms. McCottry, then he is subject to

other criminal prosecution. His rules, as prescribed by law, are very clear in this order. He was not to have contact with Michelle McCottry.

The order is dated July 6th, and it doesn't expire until July 6th of 2002. This crime took place on February 1st, well within the time frame for which he was prohibited of having contact with her.

Now, once again he knew the existence of the order. His signature was on that no contact order. So that is the first question you have to answer. Did he have contact? Was it in violation of a valid order? The order was valid. He knew about it. He was there.

The next thing you need to look at is whether or not there was an assault that constituted violation of the no contact order. The Court has read to you the instructions of what is an assault. Let's look at the evidence of the assault, Ms. McCottry's injuries.

Both officers testified that they saw injuries. Officer Tamanaha said in 14 years of his experience he could tell that these injuries were fresh. They were recent. Officer Jones even testified that they were starting to bruise in his presence. They were fresh, and they were recent.

[44] Also the interesting thing about these items being fresh is take a look at this chair and the floor around it. Take a look at the fact that on the chair is the dust from this wall.

Now, although you are bound to follow the Court's instructions you are also allowed to use some common sense. Let's think about this. How long in a house with small children is dust going to stay on a chair? Not long. Children move things. They play around.

That is fresh, and even the officers testified that it appeared fresh and not disturbed. There is also bits of the wall on the floor. Something occurred in this home, and what occurred was that the defendant assaulted Michelle McCottry.

You also need to take into account that the 911 tape started at 11:56. The officers arrived at 12:00 noon. This just occurred. You hear its. McCottry saying he's running down the street. It's a dead end street. He's running down the street. She is describing what is happening at that particular time.

This is not a situation where she waited days, hours or even extensive minutes before reporting. It is not a situation where she didn't report anything. It is right there. This happened, she reported it, it occurred.

Now, in voir dire we talked a lot about why people don't appear in domestic violence cases. We even talked about [45] some of the concerns they have and why they wouldn't want to appear. In this case, yes, Ms. McCottry is not here. And, yes, I am sure all of you would have liked to have heard from her, but this is a domestic violence case.

And domestic violence crimes are not spectator sports. They happen in homes. They happen in the privacy of homes, in private places and generally there are only two people present when these crimes occur, the victim and the defendant.

The other thing you need to consider is that in domestic violence cases, unlike random crimes, there is a relationship between these friends. And it is usually a relationship that is based out of control.

And there is fear that is present, fear to do something, fear to report the person that is the father of your two children because of economic conditions that you may be subject to, because of potential future violence that you think that you could avoid if you don't come forward.

MS. RAMEY: Objection: not based upon the evidence.

THE COURT: The objection is overruled, but it is a good occasion just to remind the jurors that Counsel's statements are argument. They are not evidence. The objection is overruled. You may proceed.

MS. GAINES: You need to consider these things when looking at this. She was not here in person, but she left [46] evidence for you to consider. There are injuries on here. There is a bruise. There is a bruise on the face where the officer indicated it was starting to swell. Her eye was starting to swell.

You have her hysterical on the phone call. You have her in the presence of the officers frantically, fearfully packing her things to leave the area. This young woman left enough evidence for you to convict the defendant and enough things to let you know that she was serious and afraid.

Help her to protect herself. Help her to protect her small children. Help her do the things that she potentially is to fearful to do for herself. Thank you. Find the defendant guilty of violation of a Court order. Thank you.

THE COURT: Ms. Gaines, would you be kind enough to move the easels out of the way. Ladies and gentlemen, I'll give the prosecutor a chance to retrieve her notes. At this time please turn your attention to Mary

Ellen Ramey who will deliver closing argument on behalf of Adrian Davis. Ms. Ramey?

MS. RAMEY: Ladies and gentlemen of the jury, your Honor, Mr. Davis, Ms. Gaines I want to thank you for your attention in this case. Most of the time jurors (inaudible 11:00:44) the waiting in the room while we're doing other things. Well, soon you are going to have the opportunity to do your work in this case.

Let me just say something about the burden of proof in [47] a criminal case. The prosecutor has the burden of proof. In a civil case – some of you may have been on a civil jury – but in a civil case the burden of proof is just the tip of a scale, 51 percent if you will.

In a criminal case the proof required is proof beyond a reasonable doubt, which is a very heavy burden, much, much more than the tip of the scale.

I only get a chance to address you once. After I sit down the prosecutor will have a chance to rebut what I have to say. So if you think of something that you would want to respond to her speak for me when you get in the back when you start your deliberation.

And the reason for this rule is that we have to end sometime so that is the logical way to end after the rebuttal argument.

During the voir dire examination I asked you several things at the end of my second round. And the things that I asked you was that anybody that would not hold the prosecution to the burden of proof in this case and nobody raised their hand.

I asked that there would be anybody who would not make up their mind until all the evidence was in that is until you start deliberation. You all agreed that you would keep an open mind.

And I asked if anybody would hold it against my [48] client, Adrian Davis, if he chose not to testify and if he chose not to present any evidence. And you all agreed that you wouldn't hold it against him.

Now, I've been taking some notes. This has been an extremely short case, and I am here to try and give you reasonable doubts. All you need is one reasonable doubt and you can't convict.

I am here to assist you and give you some reasons why you shouldn't convict, why the State has not proved its case beyond a reasonable doubt.

Now, the evidence consists of the 911 tape and the testimony of two Kent Police Officers. First of all, the 911 tape, purportedly Michelle McCottry, is not under oath. If Michelle McCottrey had been here she would have taken the witness stand.

She would have raised her hand and swore to tell the truth, the whole truth and nothing but the truth similar to the oath that you took to find the facts in this case. We are without that extremely important evidence. It is missing.

Now, if she had taken the stand under oath I would be able to cross-examine her. I would be able to ask her about what happened, who was there, when it happened, who did this, what her motives might be, why the relationship with Adrian Davis was over or whether she wanted it to be over, whether there was another man in her life, whether

she was under the [49] influence of any drugs or alcohol at the time?

I would be able to ask her all of these things and you would be able to hear from a live person. We don't have that here. All we have is a 911 tape. You are not able to assess her credibility. Is she telling you the truth? Why did she make this 911 call? Had it ever happened before? None of this is before you.

Now, we have the two police officers that testified. They don't tell you anything about the circumstances of what occurred. Again, that is a blank. What you have is two officers that go in there. They take some photographs and they say well this looks like a fresh bruise on the arm.

This looks like right in my presence I can see the mark on the face changing, the abrasion. They are not doctors. They are just there to make an arrest, and no arrest was made at the scene.

They ask her, Michelle McCottry, move your hand from your face so we can take your picture. She disobeyed. She would not move her hand. Just like she disobeyed the prosecutor and didn't come to Court.

You heard the officers talk about how this place was in a state of disarray. She was running around like a wild woman, and her only motive was to get out of there.

Now, you are going to see the no contact order when you go into the jury room, and nowhere in this no contact order [50] is there anything about Mr. Davis not having contact with his children. The no contact order was between Ms. McCottry and Adrian Davis.

So when you listen to that 911 tape you will hear a child in the background saying "Daddy" after Ms. McCottry was no longer on the phone. Does that indicate to you that he had been on the phone and not there and maybe she anticipated that he might be coming over so she panicked and she called the police. She called 911.

Ladies and gentlemen, there are people that abuse the 911 system. And the picture that you see of the rocker against the wall – there's no way to tell when that happened. There is absolutely no way, and in a house that is in that much of a disarray? Michelle McCottry is apparently was not a good housekeeper.

It is possible that that wall had been there for a long time broken. We have no evidence when that wall was actually broken and when the dust came up. And there is no police officer in the world that can say this is fresh dust.

There is no way to know when the marks got on Ms. McCottry's body. Were they there before? Were they from an old injury? We just don't know.

There is no way to show when the bruising on the arm got there. There is no medical testimony. There is no expert testimony. That could have been there for a long period of [51] time. And there is no way to show when that wall was damaged or how the wall was damaged.

And most importantly there is nobody on that witness stand that can point to Adrian Davis and say that he was there, that he was the one that did all these things that he is accused of doing.

If you listen to the 911 tape you hear a hysterical woman, but notice how she is able to turn it on and turn it

off. She turns it on when she wants to, and she turns it off when she wants to.

Now, I am going to point out a few of these jury instructions that you will have a chance to review. In jury instruction number one on page two kind of in the middle where it says that you are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each.

It says, "In considering the testimony of the witness you may take into account the opportunity and the ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence and any other factors that bear on believability and weight."

Well, I submit to you that all we have is two police officers as witnesses who have not had the opportunity to observe Michelle McCottry. You have not been able to assess her [52] memory and manner while testifying. You have not been able to have any information as to any interest, bias or prejudice that she may have.

And you have no way of assessing whether or not her testimony would be reasonable in light of all of the evidence and any other factors that weigh upon her believability and weight.

On the third page, the second paragraph from the end, it says, "You have nothing to do with any punishment that will that will [sic] be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful."

The instruction number three talks about the State being the plaintiff. They are the ones that instituted this case. They have the burden of proving each and every element beyond a reasonable doubt.

A defendant is presumed innocent. As Mr. Adrian Davis sits at the table in a black sweatshirt he is presumed innocent. And that presumption continues until during your deliberation you have found that it has been overcome by the evidence beyond a reasonable doubt.

And then it goes on the [sic] say, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully [53] considering all of the evidence or lack of evidence."

And then we have the elements that the prosecutor must prove each element beyond a reasonable doubt that on February 1st, 2001 the defendant willfully had contact with Michelle McCottry.

That that [sic] such contact was prohibited by a no contact order. That the defendant knew of the existence of the no contact order and that the acts occurred in the County of King.

I submit to you that the prosecution has failed to prove the first element that the defendant had any willful contact with Michelle McCottry. It is the prosecution's duty to prove that element beyond a reasonable doubt.

You can't speculate as to what might have happened on February 1st of this year, what could have happened, what possibly happened. That isn't enough. You need to convict based upon proof beyond a reasonable doubt.

The State's case is very weak. It is without merit and is not substantiated by evidence. There is some evidence, but that evidence does not rise to proof beyond a reasonable doubt.

You are here as triers of the facts. Not even Judge White in this case can decide the facts. As we said before you are like many judges. You have to decide whether the evidence you heard, the very little evidence you heard, rises to proof beyond a reasonable doubt.

[54] Tell the prosecution that her case is weak and that there is not enough evidence to convict the defendant, Adrian Davis. I ask you to sign the verdict that Mr. Adrian Davis is not guilty of the charge before you.

THE COURT: Thank you, Ms. Ramey. Ladies and gentlemen of the jury as under our system the party with the burden of proof does get the opportunity to address you again by way of rebuttal arguments so again please turn your attention to Nicole Gaines who will provide rebuttal argument on behalf of the State of Washington. Ms. Gaines?

MS. GAINES: Thank you, your Honor. Ms. Ramey would like you to follow several red herrings in this case. And that is her job to try and persuade you that there is a reasonable doubt there. That is what she does. That is her job, but it is just not there.

I agree, it would be nice to have Ms. McCottry here, but you don't, and what you have are other things that she's done for you to convict the defendant.

Ms. Ramey would like you to believe that no one was there to see this crime; no one that you heard from saw this crime. That is not true. You have the voice of Ms.

McCottry on that 911 tape. She reported it right when it happened.

You need to also consider the fact that the officers saw the bruising on her change in their presence. Old wounds don't change in a matter of minutes, new wounds do.

[55] That is a common sense thing. Anybody with kids, anybody that has hurt themselves, any experience with wounds whatsoever tells you that is the case.

She also pointed to the fact that the children and the no contact order doesn't address the children. It doesn't matter. The children are not the issue here. The issue is that he was not to have contact with Ms. McCottry. He had contact with her. That violated the order.

It doesn't matter whether he was allowed to see his children or not. If those children were with Ms. McCottry it doesn't matter. Her [sic] can't have contact with her at all for any reason whatsoever. The order makes that explicit.

And if you really, truly want to think about this, as you must, just consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better.

She left you her testimony on the day that this happened, February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.

* * *

911 RECORDING IS PLAYED FOR THE JURY

* * *

MS. GAINES: On February 1st, 2001 Adrian Davis was in the home of Michelle McCottry and hit her in front of [56] their small children. He left injuries on her face. That was in direct violation of a Court order. He assaulted her. And now I am asking you to find him guilty for such. Thank you.

THE COURT: Thank you, Ms. Gaines.

* * *

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, Vs. ADRIAN M DAVIS Defendant.	No. 01-1-02794-4 KNT **JUDGMENT AND SENTENCE FELONY** (Filed Dec. 17, 2001)

I. HEARING

I.1 The defendant, the defendant's lawyer, MARY ELLEN RAMEY, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

_____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds**:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 09/06/2001 by jury verdict of:

Count No.: 1 Crime: Felony Violation of a Court Order – DV
RCW 26.50.110(1) Crime Code: 06013
Date of Crime: 02/01/2001 Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

Count No.: __ Crime: _____
RCW _____ Crime Code: _____
Date of Crime: _____ Incident No. _____

[ ] Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) [ ] While armed with a **firearm** in count(s) ___ RCW 9.94A.310(3).

(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) ___ RCW 9.94A.310(4)

(c) [ ] With a **sexual motivation** in count(s) ___ RCW 9.94A.127.

(d) [ ] A V.U.C.S.A offense committed in a **protected zone** in count(s) ___ RCW 69.50.4355.

(e) [ ] **Vehicular homicide** [ ] Violent traffic offense [ ] DUI [ ] Reckless [ ] Disregard.

(f) [ ] **Vehicular homicide** by DUI with ___ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.310(7).

(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.

(h) [X] **Domestic violence** offense as defined in RCW 10.99.020 for count(s) I_____

(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.400(1)(a)

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): ____

_____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

[X] Criminal history is attached in **Appendix B**.

[ ] Prior convictions counted as one offense in determining the offender score (RCW 9.94A.360(5) are: _____

[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range
Count 1	3	V	
Count			
Count			
Count			

Enhancement	Total Standard Range	Maximum Term
	15 to 20 Months	5 Yrs And/Or $10,000

[ ] Additional current offense sentencing data is attached in **Appendix C**.

2.5 EXCEPTIONAL SENTENCE:

[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State [ ] did [ ] did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.142(2), sets forth those circumstances in attached Appendix E.

[X] Restitution to be determined at future restitution hearing on (Date) _____ at _____m.

[X] Date to be set.

[X] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability

to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $___, Court costs; [ ] Court costs are waived; (RCW 9.94A.030, 10.01.160)

(b) [ ] $___, Recoupment for attorney's fees to King County Public Defense Programs; [ ] Recoupment is waived (RCW) 9.94A.030);

(c) [ ] $___, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA; [ ] VUCSA fine waived (RCW 69.50.430);

(d) [ ] $___, King County Interlocal Drug Fund; [ ] Drug Fund payment is waived; (RCW 9.94A.030)

(e) [ ] $___, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(f) [ ] $___, Incarceration costs; [ ] Incarceration costs waived (RCW 9.94A.145(2));

(g) [ ] $___, Other costs for:_____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is $500.00 + restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $___ per month; [X] On a schedule established by the defendant's Community Corrections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of sentence or release from confinement to assure payment of financial obligations.**

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the

custody of the **Department of Corrections** as follows, commencing: [X] immediately; [ ] (Date): _____ by ___.m. I

15 months/days on count I ; ___ months/days on count ___; ___ months/day on count ___

___ months/days on count ___; ___ months/days on count ___; ___ months/day on count ___

The above terms for counts _____ are concurrent/consecutive.

The above terms shall run concurrent/consecutive with cause No.(s) _____

_____

The above terms shall run consecutive to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: _____

_____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is _____ months.

Credit is given for [X] 221 days served [ ] days as determined by the King County Jail, solely

for conviction under this cause number pursuant to RCW 9.94A120(17).

4.5 NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with Michelle McCottry except during the period in which the defendant is in custody. [/s/JW]

4.6 Blood Testing: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) **Appendix G** is a blood testing and counseling order that is part of and incorporated by reference into this Judgement and Sentence.

4.7 (a) [ ] **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.120(9), for **qualifying crimes committed before 7-1-2000**, is ordered for ___ months or for the period of earned early release awarded pursuant to RCW 9.94A.150 whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 7-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.440 not otherwise described above.] **Appendix H** for Community Placement conditions is attached and incorporated herein.

(b) [ ] **COMMUNITY CUSTODY** pursuant to RCW 9.94.120(10) for any **SEX OFFENSE committed after 6-6-96 but before 7-1-2000**, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.150 whichever is longer. **Appendix H** for Community Custody Conditions and **Appendix J** for sex offenders registration is attached and incorporated herein.

(c) [X] **COMMUNITY CUSTODY** – pursuant to RCW 9.94A.120(11) **for qualifying crimes**

committed after 6-30-2000 is ordered for the following established range:

[ ] Sex Offense, RCW 9.94A.030(36) – 36 to 48 months

[ ] Serious Violent Offense, RCW 9.94A.030(34) – 24 to 48 months

[ ] Violent Offense, RCW 9.94A.030(41) – 18 to 36 months

[X] Crime Against Person, RCW 9.94A.440 – 9 to 18 months

[ ] Felony Violation of RCW 69.50/52 – 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.150, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.205.

[X] APPENDIX H for Community Custody conditions is attached and incorporated herein.

[ ] APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **[X] WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.137 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.120(9)(b). **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9 **[ ] ARMED CRIME COMPLIANCE, RCW 9.94A.103,105.** The State's plea/sentencing agreement is [ ] attached [ ] as follows:

_____

_____

Date: 12-14-01 /s/ Jay White
JUDGE

Print Name JAY V. WHITE

Presented by:

/s/ Nicole A. Gaines #26127
Deputy Prosecuting Attorney, WSBA #

Print Name: Nicole A. Gaines

Approved as to form:

/s/ Mary Ellen Ramey 10705-
Attorney for Defendant, WSBA #

Print Name: Mary Ellen Ramey

FINGERPRINTS

[Fingerprints Omitted In Printing]

Right Hand

Fingerprints Of:

ADRIAN MARTEL DAVIS

Defendant's Signature
/s/ Adrian M. Davis

Defendant's Address: 2320 Benson Road #I202 Renton WA

Dated: 12-14-01

Attested By: Paul L. Sherfey,
Superior Court Clerk

/s/ Jay V. White
Judge, King County Superior Court

By: /s/ [Illegible]
Deputy Clerk

JAY V. WHITE

Certificate

I, _____, Clerk Of This Court, Certify That The Above Is A True Copy Of The Judgement And Sentence In This Action On Record In My Office.

Offender Identification

S.I.D. No. WA18455423
DOB: August 13, 1965
SEX: M
RACE: B

Clerk

By: _____
Deputy Clerk

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN M DAVIS Defendant,	No. 01-1-02794-4 KNT JUDGMENT AND SENTENCE, (FELONY) – APPENDIX B, CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
Theft 2	06/10/92	ADULT	90304594U 1013	MN
~~Burg 3~~ [/s/ NG]	~~06/09/92~~	~~ADULT~~	~~91325878D 3764~~	~~MN~~
Aggravated Robbery	10/20/93	ADULT	9392368R1 123	MN
VUCSA	03/12/01	ADULT	011005774	KING

[ ] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.360(11)):

Date: 12-14-01 /s/ Jay V. White
Judge, King County Superior Court
JAY V WHITE

APPENDIX H

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ADRIAN M DAVIS Defendant,	No. 01-1-02794-4 KNT JUDGMENT AND SENTENCE, APPENDIX H, COMMUNITY PLACEMENT/COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.120(9)(b); RCW 9.94A.120(10); RCW 9.94A.120(11); or RCW 9.94A.137 for Work Ethic Camp approved offenders:

Report to and be available for contact with the assigned community corrections officer as directed:

2) Work at Department of Corrections – approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location; and

6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.120(16)
7) Notify community corrections officer of any change in address or employment;
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

[ ] The defendant shall not consume any alcohol
[X] Defendant shall have no contact with: Michele McCottry except while the defendant is in custody
[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____
[X] The defendant shall participate in the following crime-related treatment or counseling services: Domestic violence batterer's treatment with a state certified agency
[ ] The defendant shall comply with the following crime-related prohibitions: _____
[ ] _____
[ ] _____
[ ] _____

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the

conditions [RCW 9.894A.120(15)] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.207]

Date: 12-14-01 /s/ Jay V. White
JUDGE

JAY V. WHITE

116 Wash.App. 81, 64 P.3d 661

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Adrian Martell DAVIS, Appellant.
No. 49679-4-I.

March 10, 2003.

AGID, J.

Adrian Davis was convicted of felony violation of a no-contact order. He appeals his conviction on three grounds: He argues the trial court (1) deprived him of his right to confrontation by admitting a 911 tape that was unreliable hearsay; (2) failed to give the jury a missing witness instruction when the victim failed to appear for trial; and (3) failed to give a complete to convict instruction because the felony violation of a no-contact order "assault" element was included in the special verdict form but not in the to convict instruction. We affirm.

FACTS

On February 1, 2001, a 911 dispatcher received a hang-up call from Michelle McCottry's residence in Kent. The 911 dispatcher called back and talked to McCottry who was upset and crying. She stated, "He's here jumping on me again." In response to the 911 operator's questions, McCottry said Davis ran out the door after hitting her with his fists, she had a protection order against him that prohibited him from seeing her, and because she was moving, Davis came to pick up some of his things. McCottry was arguing with a visitor when Davis arrived. Davis joined the argument, and McCottry stated that he

"jump[ed] up and start[ed] beating [her] up." McCottry identified herself and Davis during the call.

Officers Mark Jones and Steve Tamanaha responded to the scene. When they arrived, McCottry was visibly upset and crying. Officer Jones noticed that the house was in a state of disarray and there was damage to one of the walls. McCottry had fresh injuries on her forearm and face that were beginning to swell. While she spoke with the officers, she was frantically moving around the house and packing her family's belongings. When Officer Tamanaha photographed McCottry's injuries, she tried to cover her face. The officers later confirmed there was a protection order against Davis and cited him for violating a no-contact order. Davis was convicted of felony violation of a no-contact order and sentenced within the standard range. He filed a timely appeal.

ANALYSIS

I. Admission of the 911 Tape

In all criminal prosecutions, a defendant has a right to confront his accusers to ensure the reliability of evidence against him.[1] However, admission of a hearsay statement does not violate an accused's confrontation right if it bears adequate "indicia of reliability."[2] Reliability may be inferred when the statement either (1) falls within a firmly-rooted hearsay exception or (2) contains particularized

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[1] U.S. Const. amend. VI; Wash. Const. art I, § 22; *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

[2] *State v. Davis*, 141 Wash.2d 798, 10 P.3d 977 (2000).

guarantees of trustworthiness.[3] We review the trial court's decision that a statement is an excited utterance under the abuse of discretion standard.[4]

Davis argues that although the trial court admitted the 911 tape as an excited utterance, it does not properly satisfy Confrontation Clause concerns because it is unreliable. The State asserts that the 911 tape testimony falls within a firmly-rooted hearsay exception and therefore is inherently reliable. We agree with the State because (1) McCottry's statements were properly characterized as excited utterances and (2) excited utterances are firmly-rooted exceptions to the hearsay rule which meet the reliability test the Supreme Court adopted in *Ohio v. Roberts*.[5]

The excited utterance exception assumes that a reaction to the stress of a startling event offers little or no opportunity for a statement that is a misrepresentation or conscious fabrication.[6] A statement is an excited utterance under ER 803(a)(2) if it relates to a startling event or condition and is made while the declarant was under the stress or excitement caused by the event or condition.[7] In this case, when McCottry answered the 911 call-back there was yelling in the background and she sounded frantic as she responded to the operator's questions about what was happening. When McCottry identified Davis and told the

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[3] *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[4] *State v. Strauss*, 119 Wash.2d 401, 417, 832 P.2d 78 (1992).

[5] 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

[6] *State v. Palomo*, 113 Wash.2d 789, 796-98, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

[7] *State v. Jackson*, 113 Wash.App. 762, 54 P.3d 739 (2002).

operator he was running from the scene in his car, she abruptly dropped the phone, saying she needed to close the door to the house. The police officers who responded to the scene several minutes after the call corroborated her condition by describing her as "crying" and visibly "upset." Because the statements made on the tape were clearly made during and immediately after a startling event and related to that event, they are properly admitted as excited utterances.

An excited utterance is a firmly-rooted hearsay exception.[8] If a statement falls within a firmly-rooted hearsay exception, adequate indicia of reliability are presumed under *Roberts*.[9] When a hearsay statement satisfies the requirements of *Roberts*, further inquiry into whether the statement is trustworthy is not necessary.[10] We accordingly reject Davis' argument that this court should examine "circumstantial indicators" that the 911 tape is unreliable under the factors set forth in *State v. Ryan*.[11]

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[8] *Davis*, 141 Wash.2d at 846, 10 P.3d 977.

[9] *Id.* at 848 n. 281, 10 P.3d 977 (citing *State v. Whelchel*, 115 Wash.2d 708, 715, 801 P.2d 948 (1990)).

[10] *Id.* at 847, 10 P.3d 977; *see also State v. Smith*, 148 Wash.2d 122, 59 P.3d 74, 79 (2002) (when an out-of-court statement *does not* fall under one of the firmly-rooted hearsay exceptions, the Confrontation Clause requires the proponent of the statement to demonstrate that the declarant is unavailable and that the statement bears adequate indicia of reliability under *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197 (1984)).

[11] 103 Wash.2d 165, 691 P.2d 197 (1984) (listing nine factors useful in determining whether prior out-of-court statements violate a defendant's right to confrontation).

Davis claims *State v. Brown*[12] and *Lilly v. Virginia*[13] support his argument that an excited utterance can be unreliable. Neither case is persuasive. In *Brown*, the victim told authorities that she was abducted and raped. At the pretrial hearing, the trial court admitted a 911 tape of her telephone conversation with an operator. At trial, the victim testified that she fabricated the statements she made on the 911 tape. The Washington Supreme Court concluded the trial court abused its discretion by admitting the tape as an excited utterance because it was an actual fabrication. There is no evidence of fabrication in this case. In *Lilly*, the U.S. Supreme Court held an accomplice's confession obtained in police custody and admitted under the "statement against penal interest" exception to the hearsay rule was unreliable because of the accomplice's natural motive to attempt to exculpate himself."[14] Statements against penal interest are not among the firmly-rooted exceptions to the hearsay rule.[15] Nor is McCottry an accomplice or coconspirator, and the record reveals no reason for her to lie.[16]

Davis also relies on *State v. Ross*[17] in which this court held that the State violated a defendant's right to confrontation by introducing hearsay statements on a 911 tape when the declarant failed to testify. Although no case has expressly overruled *Ross*, its holding was effectively overruled by the Washington Supreme Court's opinion in

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[12] 127 Wash.2d 749, 903 P.2d 459 (1995).

[13] 527 U.S. 116, 133, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).

[14] *Lilly*, 527 U.S. at 121-22, 119 S.Ct. 1887.

[15] *Id.* at 134, 119 S.Ct. 1887.

[16] Davis admits that no motive to lie was offered at trial.

[17] 42 Wash.App. 806, 714 P.2d 703 (1986).

State v. Palomo.[18] in *palomo*, THE COURT Rejected "the broad proposition that the confrontation clause bars admissibility of hearsay statements unless unavailability of the declarant is shown."[19] The *Palomo* court held that a statement is properly admitted under the excited utterance exception to the hearsay rule regardless of the declarant's availability at trial.

In sum, we conclude that the trial court properly admitted the 911 tape as an excited utterance, and its admission does not offend Davis' right to confrontation because the statements fall within a firmly-rooted hearsay exception.

II. The Missing Witness Instruction

Davis argues that the trial court erred by failing to give the jury a missing witness instruction when McCottry did not testify at trial. The instruction informs the jury it can infer from the witness' absence at trial that her testimony would have been unfavorable to the party who would logically have called her. The instruction is appropriate when (1) the witness is "peculiarly available" to a party, (2) the witness' testimony relates to an issue of fundamental importance, and (3) circumstances at trial establish that, as a matter of reasonable probability, the party would not fail to call the witness unless her testimony would have been damaging or unfavorable.[20] But no inference is permitted if the witness' absence can be

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[18] 113 Wash.2d 789, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990).

[19] *Palomo*, 113 Wash.2d at 794, 783 P.2d 575.

[20] *State v. Davis*, 73 Wash.2d 271, 276-78, 438 P.2d 185 (1968).

satisfactorily explained.[21] We conclude that the trial court properly refused to give the missing witness instruction because McCottry's absence was satisfactorily explained at trial and the record shows that the State used all available means to locate her.

McCottry was unavailable because the State could not locate her even though it reasonably believed she would appear at trial. The State was in contact with McCottry until the day of trial.[22] During that time, she appeared when asked to appear, met with the prosecutor several times, and promptly returned the prosecutor's and victim advocate's phone calls. McCottry told the prosecutor that she would appear at trial, and the State subpoenaed her. When McCottry unexpectedly failed to appear for a defense interview, the prosecutor tried to locate her to no avail. The following day, the victim's advocate got a phone message from McCottry in which she said that Davis had contacted her and threatened that her children would be taken away and she would look like a liar if she came and testified. The prosecutor explained that McCottry and her children were involved in a house fire two weeks before, there were concerns about housing arrangements, and the State did not know where she was living. This was a fully adequate explanation.[23]

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[21] *Id.*

[22] The prosecutor spoke with McCottry by telephone the night before her scheduled appearance.

[23] *See State v. Lopez*, 29 Wash.App. 836, 631 P.2d 420 (1981) (upholding a court's refusal to give a missing witness instruction by concluding that the State satisfactorily explained that the witnesses did not appear after agreeing to testify at trial and the State could not locate them).

Second, the State used all available means to locate McCottry. When she failed to appear for a defense interview, the prosecutor immediately attempted to contact her personally and through the victim's advocate. Both attempted to contact her by telephone, the State sent a detective to her last known address, and the detective attempted to find her address through a reverse phone directory.[24] Despite this, the State could not locate McCottry.

Because the State provided a satisfactory explanation for the witness' absence and used all available means to contact her, the trial court properly refused a missing witness instruction.

III. The To Convict Instruction

Finally, Davis contends he was deprived of due process because the to convict jury instruction for felony violation of a domestic violence no-contact order omitted the statutory "assault" element. The State argues that (1) Davis waived his right to appeal under RAP 2.5(a) by

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[24] Davis argues that the State did not use all available means because it did not obtain a material witness warrant. The State explained to the trial court that because McCottry agreed to testify, it did not obtain one. It did not issue one when McCottry unexpectedly failed to appear because even with the warrant, they had no ability to pick her up without knowing where she was. *See State v. Hobson*, 61 Wash.App. 330, 338, 810 P.2d 70, *review denied*, 117 Wash.2d 1029, 820 P.2d 510 (1991) (noting that "Washington case law is silent on the issue of whether the State must obtain a material witness warrant to hold a witness in custody whenever the State knows such action may be necessary to ensure the witness's presence at trial."). In this case, it would have been futile because the State could not have served the warrant.

failing to object to the instruction below and (2) in any case, the trial court instructed the jury on all of the crime's elements. Failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal,[25] so we reject the State's first argument. This court reviews a challenged jury instruction de novo.[26] Jury instructions are to be read as a whole, and each one is read in the context of all others given.[27] Instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case.[28]

At the conclusion of testimony, the trial court instructed the jury on the law. First, the court instructed the jury that in order to find Davis guilty of violation of a no-contact order, each of the following elements must be proved beyond a reasonable doubt

(Instruction 9):

> (1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;

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[25] *State v. Deryke*, 110 Wash.App. 815, 819, 41 P.3d 12[illegible] (2002) (citing *State v. Aumick*, 126 Wash.2d 422, 429-30, 894 P.2d 1325 (1995)), *review granted*, 148 Wash.2d 1001, 60 P.3d 1211 (2003).

[26] *Id.* (citing *State v. Pirtle*, 127 Wash.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

[27] *Id.* (citing *State v. Brown*, 132 Wash.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998)).

[28] *Id.* (citing *State v. Mark*, 94 Wash.2d 520, 526, 618 P.2d 73 (1980)).

> (2) That such contact was prohibited by a no-contact order;
>
> (3) That the defendant knew of the existence of the no-contact order;
>
> (4) That the acts occurred in the County of King.

The court also included an instruction that defined the term "assault" for the jury (instruction 8). And it gave the jury the following instruction on the special verdict form (instruction 12), which read:

> You will also be furnished with a special verdict form. If you find the defendant not guilty of the crime of violation of a no contact order, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blanks "yes" or "no" according to the decision you reach. In order to answer the question on the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Finally, the court gave the jury a special verdict form on which it was to indicate whether the State had proven the factor which makes violation of the no-contact order a felony. It read:

> We, the jury, return a special verdict by answering as follows:
>
> Was the conduct that constituted a violation of the no-Contact order an assault?

ANSWER:

_____

(Yes or No)

Davis now argues the to convict instruction for felony violation of a no-contact order was incomplete because the "assault" element was not included. The State asserts there was no error because the court gave instructions 8 and 12 and the accompanying special verdict form, which fully instructed the jury on the factor that elevates the crime to a felony violation of a domestic violence no-contact order. We agree with the State.

As a general rule, the to convict instruction need not specify every element of the charged crime in every case.[29] In *State v. Emmanuel*,[30] the State charged the defendant with bribery, and the court gave a detailed to convict instruction including all but one of the crime's elements. The Washington Supreme Court held this instruction was deficient, reasoning that by undertaking to specifically tell the jury that they could convict the defendant if they found that four elements of the crime had been proven, the judge provided "a yardstick by which the jury were [sic] to measure the evidence in determining appellant's guilt or innocence of the crime charged."[31] The *Emmanuel* court stated that when the instruction purported to include all the elements, the jury was not required to search other instructions to see if another element alleged in the information should have been added.[32] Thus, if the to

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[29] *State v. Emmanuel*, 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

[30] 42 Wash.2d 799, 819, 259 P.2d 845 (1953).

[31] *Id.*

[32] *Id.*

convict instruction acts as a yardstick of the law, it must include a complete summation of that law.[33] Where a trial court has not undertaken to provide a yardstick to the jury, the instructions are to be read as a whole and each instruction is to be read in the context of all the others given.[34]

The State relies on *State v. Oster*.[35] There the defendant was also charged with felony violation of a no-contact order. The factor which elevated the crime from a misdemeanor to a felony was Oster's prior convictions for the same crime.[36] The Washington Supreme Court had to determine the adequacy of a to convict instruction that omitted prior convictions as an element of the crime, but were, as here, included in a separate instruction and special verdict form. The *Oster* court concluded it was not an error to instruct the jury separately and by special verdict form on prior criminal history because the instructions clearly set forth all the elements of the crime and the jury did not have to search the other instructions for missing elements.[37] The *Oster* decision therefore recognizes a "limited exception to the rule that all of the elements of the crime must appear in the 'to convict' instruction when

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[33] *Id.*

[34] *Brown*, 132 Wash.2d at 605, 940 P.2d 546.

[35] 147 Wash.2d 141, 52 P.3d 26 (2002).

[36] Oster was charged under former RCW 10.99.040 and .050 (1996), which provided that a violation of a no contact order will be punished as a class C felony if (1) the defendant had two or more prior convictions for the same crime, (2) the violator assaulted the person protected by the order, or (3) the violator recklessly created a substantial risk of death or serious injury. The current statute RCW 25.50.110(4)-(5) contains identical factors which elevate the crime to a felony.

[37] *Oster*, 147 Wash.2d at 147, 52 P.3d 26.

the element is prior convictions, and a special verdict form is used to instruct the jury to determine their existence beyond a reasonable doubt."[38] Although the missing element in this case involves assault rather than prior convictions, the issue and procedure used in *Oster* are almost identical to this case, and we conclude that its rationale logically applies to the instructions in this case as well.

A charge of violation of a no-contact order asks the jury to determine whether the defendant violated a valid no-contact order. If so, the misdemeanor crime is elevated to a felony when (1) the contact that violated the order amounted to misdemeanor assault, (2) the conduct that violated the order was reckless and created a substantial risk of death or serious physical injury to another person, or (3) the defendant has two or more convictions for the same crime.[39] Unlike most crimes, felony violation of a no-contact order is not a separate, distinct crime.[40] Rather, the statute defines a misdemeanor crime and then enumerates the grounds on which the crime is elevated to a felony.

The to convict instruction here did not purport to contain all of the crime's elements. Rather, the trial court

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[38] *Id.* at 148, 52 P.3d 26.

[39] RCW 26.50.110(4)-(5) (2003).

[40] For example, the Revised Code of Washington includes four separate statutes for the crime of assault. While the different felony classes of assault are set forth under RCW 9A.36.011-.31, misdemeanor assault is set forth under its own statute, RCW 9A.36.041. The Revised Code of Washington also separates felony theft from misdemeanor theft. While RCW 9A.56.030-.040 sets forth the elements of felony theft, RCW 9A.56.050 sets forth the elements of misdemeanor theft.

followed the Washington pattern jury instructions[41] and separated felony violation of a no-contact order into two instructions with a special verdict form. Davis argues that the jury should have been given one instruction for felony violation of a no-contact order and a lesser included instruction for misdemeanor violation of a no-contact order. This approach, we conclude, would potentially lead to jury confusion because its construction would be unduly awkward.

When the charge is murder, robbery, assault, and other traditionally-defined crimes and the jury fails to unanimously find any one of the elements, it must acquit on the greater crime. With crimes structured like violation of a no-contact order, the failure to find only one specific element requires the jury to acquit on the greater (felony) crime.[42] Constructing a single instruction on the lesser included model under these circumstances has great potential to confuse the jury and result in erroneous verdicts. Indeed, the statutory structure of the latter crimes is more akin to enhancements like committing a crime while armed with a firearm that the jury regularly decides by special verdict.[43]

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[41] 11 Washington Pattern Jury Instructions: Criminal 36.54-.55 (2d ed.1998).

[42] Other crimes with same statutory construction are harassment (RCW 9A.46.020), indecent exposure (RCW 9A.88.010), and stalking (RCW 9A.46.110).

[43] Former RCW 9.94A.310(3) recodified as RCW 9.94A.510(3) (2001). Drug crime enhancements for proximity to a school, school bus, or park are similar examples. Former RCW 9.94A.310(5) recodified as RCW 9.94A.510(5) (2001).

A defendant benefits from having the instructions bifurcated because the special verdict instruction safeguards him or her from being mistakenly convicted of an elevated crime by a confusing and less direct instruction that attempts to coherently combine the special verdict and the to convict instructions into one.

All the pertinent law need not be incorporated into one instruction.[44] It is only when the jury may have assumed that the to convict instruction is itself a complete statement of the elements of the crime charges that it must in fact include them. Here the trial court followed the Washington Pattern Jury Instructions' (WPIC) bifurcated pattern instructions and placed the special verdict felony instruction after the to convict for misdemeanor violation of a no-contact order instruction. Because of this, it is clear that the court did not intend to provide a "yardstick" with its to convict instruction. The instructions were meant to be read as a whole and each one read in the context of all others.

In addition, there is no danger that this approach confused the jury. As in *Oster*, "no searching was necessary" for the jury in this case.[45] "[E]verything the jury was required to decide was clearly laid out for the jury to decide."[46] Instruction 1 told the jury to consider the instructions as a whole and to not place undue emphasis on any particular instruction or part thereof. Instruction 3 informed the jury that each element was at issue and that the burden of proving each element beyond a reasonable

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[44] *Emmanuel*, 42 Wash.2d at 819, 259 P.2d 845.

[45] *Oster*, 147 Wash.2d at 147, 52 P.3d 26.

[46] *Id.*

doubt rested with the State. Instruction 8 defined the term "assault" for the jury. Instruction 9 provided the elements of violation of a no-contact order. Instruction 12 informed the jury about the special verdict form, instructing them to fill out the form only if they found the defendant guilty of the misdemeanor crime and to answer yes only if they unanimously agreed beyond a reasonable doubt. Instruction 12 and the special verdict form included the enhancing element of assault. When read together, the to convict instruction and the special verdict instruction supply all the crime's elements in the manner suggested by the WPIC.[47] This manner of instructing the jury benefits the defendant as well because the jury was required to conclude, not once but twice, that the State met its burden beyond a reasonable doubt.

Accordingly, we conclude there is no constitutional infirmity. We affirm.

COLEMAN and ELLINGTON, JJ., concur.

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[47] While the WPIC's are not binding on the court, they are persuasive authority. *State v. L.J.M.*, 79 Wash.App. 133, 140, 900 P.2d 1119 (1995), *rev'd on other grounds*, 129 Wash.2d 386, 918 P.2d 898 (1996).

[Appendix A to WACDL's Brief
in the Washington Supreme Court
(Filed May 10, 2004)]

VALLEY COMMUNICATIONS CENTER — **STANDARD OPERATING PROCEDURES**

POLICY NUMBER: 602 — **POLICE INCIDENT INTERVIEW TECHNIQUES**

1.0 PURPOSE/REFERENCES:

To establish a uniform method of interviewing callers requesting police assistance.

CALEA Standards: 6.2.2

2.0 POLICY:

It shall be the policy of Valley Communications Center to conduct thorough and accurate interviews using these guidelines anytime a police related call for service is received.

3.0 PROCEDURE:

On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information. The employee should have thorough knowledge of the POLICE TYPE CODES in order to quickly classify the reporting party's situation and create a CAD incident. A police incident should never be delayed while attempting to determine if a fire department/EMS response is also required. The ACTION CODE "D"

should be utilized for all in-progress and recent incidents. This allows basic information to be forwarded to the dispatcher and a response generated while additional information is obtained and added in supplemental form. The following are guidelines to be used during the interview of a reporting party:

3.1 Where:

3.1.1 Location/address where the incident took place in order to establish jurisdictional responsibility?

3.1.2 Street address, house or apartment number, trailer space or suite number?

3.1.3 Apartment complex, building or business name?

3.2 What:

3.2.1 Type of incident (robbery, burglary, theft)?

3.2.2 What are the potential dangers (situation escalating)?

3.2.3 Are circumstances or injuries present requiring fire/EMS response?

3.3 When (Time Delay):

3.3.1 In Progress (0-5 minutes after occurrence, or suspect on location)?

3.3.2 Recent (6-15 minutes after occurrence)?

3.3.3 Report (16 or more minutes after occurrence)?

3.4 Weapons (Gun or Knife):

3.4.1 Are weapons present or accessible?

3.4.2 What type of weapons?

3.5 Who:

3.5.1 Is the suspect(s) known to reporting party?

3.5.2 Current location of suspect(s)?

3.5.3 Number of suspect?

3.5.4 Name and DOB of suspect(s)?

3.5.5 Description of suspect(s) using head-to-toe method?

3.5.6 Associated vehicle descriptions using CYMBAL method?

3.5.7 Direction of travel?

3.6 Why:

3.6.1 What circumstances led to the incident?

3.6.2 Additional pertinent details relating to incident?

3.7 RP Information:

3.7.1 Name, address, phone number (where can RP be reached)?

3.7.2 Relationship to incident or those involved?

3.7.3 Does the reporting party want officer contact?

Date Originated: 03/03/98 Date Revised: N/A

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154 Wn.2d 291, 111 P.3d 844

Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Adrian Martell DAVIS, Appellant.
No. 73893-9.

Argued Sept. 14, 2004.
Decided May 12, 2005.
As Amended May 31, 2005.

IRELAND, J.*

¶ 1 This case requires us to determine whether the admission of a 911 call violated the defendant's Sixth Amendment right to confrontation under the United States Supreme Court's recent decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We hold that emergency 911 calls should be assessed on a case by-case basis and that the statements made should be individually evaluated for admissibility in light of the confrontation clause. We hold that overwhelming untainted evidence supports Adrian Davis's conviction and that any error in admitting "testimonial" statements without cross-examination was harmless beyond a reasonable doubt.

¶ 2 The defendant also claims that the jury instructions were fatally flawed because the element that raises the crime of domestic violence violation of a court order from a misdemeanor to a felony was not included in the "to convict" instruction, but rather was placed in a special

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* Justice Faith Ireland is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

interrogatory. We hold that such bifurcation is constitutionally permissible where the legislature has created a statutory framework that establishes a base crime and provides for elevated penalties upon proof of an additional fact as determined by a unanimous jury. We therefore affirm the Court of Appeals.

FACTS

¶ 3 On February 1, 2001, Michelle McCottry called 911. McCottry hung up before speaking to anyone. The 911 operator called McCottry back and asked her what was happening. McCottry was hysterical and crying as she responded, "He's here jumpin' on me again." Ex. 2 (911 audiotape). The 911 operator asked who McCottry was referring to, what his relationship to her was, and whether he had been drinking. McCottry identified her assailant as Adrian Davis. She told the operator that Davis had used his fists to beat her and that he had left the residence moments earlier. McCottry indicated that she had a protective order against Davis.

¶ 4 Police officers Mark Jones and Steve Tamanaha responded within four minutes of McCottry's call to 911. They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face. The officers observed McCottry's frantic efforts to gather her belongings and her children so that they could leave the residence.

¶ 5 Davis was charged with one count of felony violation of the provisions of a domestic no-contact order under RCW 26.50.110(1), (4). The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that

appeared to be recent, but neither officer could testify as to the cause of the injuries. A certified copy of the no-contact order was admitted into evidence.

¶ 6 McCottry did not testify. Although she initially cooperated with the prosecutor's office, the State was unable to locate McCottry at the time of trial. The only evidence linking Davis to her injuries was the tape recording of the 911 call.[1] The defense argued that admission of the 911 tape would violate Davis's right of confrontation, but the court admitted the tape under the excited utterance exception to the hearsay rule. At trial, the court denied the request of Davis's counsel for a missing witness instruction concerning McCottry.

¶ 7 The "to convict" instruction told the jury to convict Davis of domestic violence violation of a court order if the State proved each of the following elements beyond a reasonable doubt:

> (1) That on or about February 1, 2001 the defendant willfully had contact with Michelle McCottry;
>
> (2) That such contact was prohibited by a no-contact order;
>
> (3) That the defendant knew of the existence of the no-contact order;
>
> (4) That the acts occurred in the County of King. Clerk's Papers at 21 (Instruction 9).

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[1] The tape had been redacted to remove references to a police visit to the residence two days earlier for a domestic disturbance between Davis and McCottry.

¶ 8 Instruction 12 directed the jurors to use the special verdict form only if they found the defendant guilty of the crime of violation of a no-contact order. The special verdict form asked if Davis's conduct that constituted a violation of the no-contact order was an assault. In order to answer the special verdict form in the affirmative, the jury was instructed to be unanimously satisfied beyond a reasonable doubt that "yes" was the correct answer. These instructions followed the *Washington Pattern Jury Instructions. See* 11 *Washington Pattern Jury Instructions: Criminal* 36.51, 36.54-36.55 at 182-83, 187-89 (2d ed. Supp.1998) (WPIC).

¶ 9 Davis did not object to the jury instructions, but he did take exception to the court's refusal to give his proposed missing witness instruction. The jury rendered a general verdict of guilty and answered "yes" to the special verdict form.

¶ 10 On appeal, the Court of Appeals rejected Davis's confrontation clause argument. Relying on *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a firmly rooted exception to the hearsay rule and thus satisfies the requirements of reliability. The court also rejected Davis's arguments that the trial court erred in refusing the missing witness instruction and in placing the assault element in a special interrogatory rather than placing it in the "to convict" instruction. *State v. Davis,* 116 Wash.App. 81, 64 P.3d 661 (2003).

¶ 11 This court granted review and initially consolidated the case with *State v. Mills,* No. 73894-7 (Wash. Apr. 28, 2003), because the primary issue in each case was the

propriety of the "to convict" jury instruction. The cases were argued on November 19, 2003.

¶ 12 Before this court issued an opinion in this case and the *Mills* case, the United States Supreme Court issued its opinion in *Crawford,* which altered confrontation clause analysis. The *Crawford* court held that an out-of-court "testimonial statement" of a witness is inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine him or her. On April 30, 2004, Davis filed a motion for oral argument in light of *Crawford.* The State also requested oral argument.

¶ 13 We granted the parties' requests for additional briefing and argument on the issues raised by *Crawford.* After rehearing, we deconsolidated the *Davis* and *Mills* cases and treated them as companion cases, issuing a separate opinion in each case.

ISSUES

¶ 14 1. Did the trial court err in admitting Michelle McCottry's conversation with the 911 operator?

¶ 15 2. Did the trial court err in placing the element that raises the crime from a misdemeanor to a felony in a special verdict form rather than in the "to convict" instruction?

ANALYSIS

Confrontation Clause

¶ 16 The Sixth Amendment confrontation clause provides: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him. U.S. Const. amend. VI. The *Roberts* court determined that the confrontation clause does not bar the statement of an unavailable witness against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" 448 U.S. at 66. Under *Roberts*, adequate reliability could be inferred when the statement either (1) falls within a firmly rooted hearsay exception or (2) contains particularized guarantees of trustworthiness. *Id.*

¶ 17 In *Crawford*, the Supreme Court overturned the *Roberts'* rule that an out-of-court statement was admissible as evidence without confrontation as long as it fell within a firmly rooted hearsay exception or carried other indicia of trustworthiness and reliability, stating that the "[*Roberts'*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." 541 U.S. at 63, 124 S.Ct. 1354.

¶ 18 The *Crawford* court began by examining the historical background of the confrontation clause:

> The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.
>
> Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony .... *Id.* at 43, 124 S.Ct. 1354 (citation omitted).

¶ 19 From its examination of the history of the confrontation clause, the Court gleaned two overriding principles: (1) the primary purpose of the confrontation clause was preventing the civil law mode of criminal procedure,

particularly the use of ex parte examinations as evidence against the accused; and (2) the Framers would not have allowed the admission of the testimonial statements of a witness who did not appear at trial unless he or she was unavailable to testify and the defendant had a prior opportunity for cross-examination. *Id.* at 47-48, 53-54, 124 S.Ct. 1354.

¶ 20 The Court declined to spell out a comprehensive definition of "testimonial." But it did give several examples of the types of statements at the core of the definition, including prior testimony at a preliminary hearing, before a grand jury or at a former trial, and police interrogations. "These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* at 68, 124 S.Ct. 1354.

¶ 21 The Court also explained that "testimony," is typically defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51, 124 S.Ct. 1354 (quoting 1 Noah Webster, *An American Dictionary of the English Language* (1828)). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* The text of the Sixth Amendment and the history underlying the common-law right of confrontation reflect "an especially acute concern with a specific type of out-of-court statement." *Id.*

¶ 22 In the *Crawford* case, Michael Crawford was charged with assault and attempted murder. *Id.* at 40, 124 S.Ct. 1354. After his wife, Sylvia, was given *Miranda*[2]

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

warnings, she was questioned. *Id.* "Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case .... In response to often leading questions from police detectives, she implicated her husband in [the] stabbing and at least arguably undermined his self-defense claim." *Id.* at 65, 124 S.Ct. 1354. She did not testify at trial because of the marital privilege. *Id.* at 38, 124 S.Ct. 1354. Instead, a tape recording of her statement was played to the jury at the defendant's trial. *Id.* at 40, 124 S.Ct. 1354. The Supreme Court held that Sylvia's recorded statement was testimonial and thus inadmissible because it had not been subject to cross-examination.

¶ 23 A statement may be testimonial by virtue of the manner or mode of its making. For example, Sylvia Crawford's in-custody, tape-recorded statement taken by police officers was deemed "testimonial under even a narrow standard." *Id.* at 52, 124 S.Ct. 1354. Police interrogations are very similar to examinations by justices of the peace, who had essentially investigative and prosecutorial functions. Interrogations by law enforcement officers fall squarely within the classification of testimonial statements. *Id.* at 53, 124 S.Ct. 1354.

¶ 24 On the other hand, *Crawford* allows that "not all hearsay implicates the Sixth Amendment's core concerns." *Id.* at 51, 124 S.Ct. 1354. An offhand, overheard remark, although perhaps objectionable under hearsay rules, "bears little resemblance to the civil-law abuses the Confrontation Clause targeted." *Id.* Further, even testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted. *Id.* at 60 n. 9, 124 S.Ct. 1354.

¶ 25 The primary issue in the present case is whether McCottry's 911 call constitutes a "testimonial" statement under the *Crawford* analysis. The context of a 911 call presents a more complex scenario than the in-custody, *Miranda*-warned interrogation by police officers at issue in *Crawford*. Sylvia Crawford's statement was given during a custodial examination, which the *Crawford* court indicated fell within even a narrow definition of testimonial.

¶ 26 Generally, an emergency 911 call is not of the same nature as an in-custody interrogation by police. Such an emergency call is not the functional equivalent of uncross-examined, in-court testimony. Even though a call to 911 involves personnel associated with the police, the 911 operator is not a police officer. Moreover, the purpose of the call is generally not to "bear witness." The call must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.

¶ 27 A 911 call is typically initiated by the victim, not the police. Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, where the call is not undertaken for those purposes, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.

¶ 28 In *People v. Corella*, 122 Cal.App.4th 461, 18 Cal.Rptr.3d 770 (2004), the court held that admission of a 911 call did not violate the defendant's right to confrontation, and his conviction for corporal injury to his spouse was affirmed. The *Corella* court determined that the statements made to the 911 operator were not "'knowingly given in response to structured police questioning'" and did not have the formal and official quality of the statements deemed testimonial by *Crawford*. 18 Cal.Rptr.3d at

776 (quoting *Crawford,* 541 U.S. at 53 n. 4, 124 S.Ct. 1354).

¶ 29 The *Corella* court further stated that it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial. *Id.* The rationale behind the excited utterance exception to the hearsay rule is that the statement is "made without reflection or deliberation due to the stress of excitement." *Id.* "[S]tatements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." *Id. See also State v. Wright,* 686 N.W.2d 295, 302 (Minn.Ct.App.2004) (victims' statements to 911 operator seeking help immediately after assault not testimonial); *Beach v. State,* 816 N.E.2d 57, 59 (Ind.Ct.App.2004) (victim's statement to responding police at scene after assault not testimonial); *State v. Forrest,* 164 N.C.App. 272, 596 S.E.2d 22, 27 (2004) (victim's statements to police upon rescue from defendant nontestimonial).

¶ 30 In most cases, one who calls 911 for emergency help is not "bearing witness," whereas calls made to the police simply to report a crime may conceivably be considered testimonial. It is necessary to look at the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent. *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 Crim. Just., Summer 2004, at 4, 10 (whether statements made in calls to 911 operators are testimonial requires case-by-case assessment).

¶ 31 Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL) argues it is common knowledge that 911 calls may be used at subsequent trials and that McCottry reasonably knew her 911 call would later be used to prosecute Davis. Thus, McCottry's call would fit within one of the core classifications of testimonial hearsay listed in *Crawford*. WACDL Br. at 14 (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L.Rev. 1171, 1196 (2002)). However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911.

¶ 32 The WACDL further argues that if a 911 call involves a completed event, no matter how recent, the caller's remarks will be testimonial. But this argument fails because it focuses on the reliability traditionally accorded excited utterances under hearsay rules by virtue of their spontaneity. *Crawford* rejected the use of evidentiary rules and "amorphous notions of 'reliability'" in assessing whether the protections of the confrontation clause have been satisfied. 541 U.S. at 61, 124 S.Ct. 1354. *Crawford* instructs that for purposes of Sixth Amendment confrontation, the inquiry is whether the "witness" was testifying. As the *Crawford* court explained, the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50, 124 S.Ct. 1354. McCottry's 911 call cannot accurately be described as an ex parte examination or its functional equivalent.

¶ 33 Nor is it accurate to describe the events that occurred during McCottry's call as "completed." The fact that the operator determined McCottry did not need an aid car does not necessarily mean McCottry was out of danger or

that her subsequent responses were then testimonial. Her 911 call was part of an ongoing emergency situation. When the operator called McCottry back, McCottry was crying and hysterical. Only in hindsight was it known that Davis would not reappear and that the assault had ended when he left the residence.

¶ 34 Davis also contends that this call was not a typical 911 call because McCottry hung up and the 911 operator called McCottry back. But the fact that McCottry hung up does not render the phone call testimonial. On the contrary, a hang-up call often signals that the caller is in grave danger, and the 911 operator must return the call to ensure the caller's safety. It would be unwise to label 911 hang-up calls as testimonial simply because the operator must call the victim back to determine the seriousness of the situation. Rather, the circumstances and content of the call should be examined in each case.

¶ 35 Davis points to the prosecutor's closing argument where McCottry's call was described as her "testimony." Report of Proceedings (Sept. 5, 2001) at 55. According to Davis, in using the word "testimony," the State essentially admitted that the 911 call was testimonial. However, the statement was made before the *Crawford* decision focused confrontation clause analysis on the word "testimonial." Since *Crawford,* "testimony" has acquired a specific meaning that should not be attributed to the State pre-*Crawford.*

¶ 36 An emergency 911 call may contain both statements which are nontestimonial and statements which are testimonial. In *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994), the Court rejected the "whole statement" approach and held that federal

courts should examine proffered hearsay narrative by separating inculpatory portions from portions which are self-serving and require redaction. 512 U.S. at 603, 114 S.Ct. 2431. We adopted the *Williamson* holding in *State v. Roberts,* 142 Wash.2d 471, 494, 14 P.3d 713 (2000). The *Roberts* court held that erroneous admission or exclusion based upon a "whole statement" approach is subject to harmless error analysis.

¶ 37 A violation of the confrontation clause is also subject to harmless error analysis where the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Smith,* 148 Wash.2d 122, 138-39, 59 P.3d 74 (2002).

¶ 38 Under the facts of the present case, McCottry called 911 because of an immediate danger. There is no evidence McCottry sought to "bear witness" in contemplation of legal proceedings. Nonetheless, certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant.

¶ 39 To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." *Smith,* 148 Wash.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing *State v. Guloy,* 104 Wash.2d 412, 426, 705 P.2d 1182 (1985)).

¶ 40 In this case, the officers arrived four minutes after McCottry's 911 call and observed and documented her fresh injuries with photographs that were introduced into

evidence. The portion of McCottry's 911 call that identified Davis as her assailant was nontestimonial and properly admitted. The certified copy of the prior no-contact order was also admitted into evidence. Thus, the untainted evidence was overwhelming, and any error in admitting testimonial statements from the 911 call was harmless beyond a reasonable doubt.

Preservation of Error

¶ 41 Before addressing the adequacy of the "to convict" instruction, it is necessary to address the State's argument that Davis waived his right to challenge the "to convict" jury instruction because he did not take exception to the instruction at trial.

¶ 42 Although recognizing this court's power to review constitutional errors, the State argues the alleged error lacked the "manifest" requirement of RAP 2.5(a)(3), which permits a party to raise for the first time on appeal a "manifest error affecting a constitutional right." The Court of Appeals properly rejected this argument.

¶ 43 The State argues that Davis cannot show practical and identifiable consequences as a result of the bifurcated element. But, as we recently held in *State v. Mills,* 154 Wash.2d 1, 109 P.3d 415 (2005), the "to convict" instruction carries special weight because the jury relies on it as a "yardstick" by which to determine a defendant's guilt or innocence. *Id.* at 417. The issue of omission of an element from a "to convict" instruction is of sufficient constitutional magnitude to warrant review of a challenge to the instruction raised for the first time on appeal. Accordingly, we address the merits of Davis's challenge.

"To Convict" Jury Instruction

¶ 44 Davis argues the bifurcation from the "to convict" instruction of the assault element, which elevates his base misdemeanor crime to a felony, unconstitutionally relieved the State of proving the element of assault, thereby violating his constitutional rights to due process[3] and to a jury trial.[4]

¶ 45 The State responds by asserting that the jury did find every element of the crime beyond a reasonable doubt, and that appearance of the elevating fact in a special verdict form does not deny a defendant due process, as the practice has been traditionally utilized and approved in other crimes where an elevating fact increases the statutory penalty.

¶ 46 We recently discussed this issue at length in *Mills*. There we held that where the legislature has established a statutory framework which defines a base crime that may be elevated to a greater crime if a certain fact is present, a trial court may, consistent with the guaranties of due process and trial by jury, bifurcate the elevating fact into a special verdict form. As long as the jury is instructed it must unanimously agree beyond a reasonable doubt

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[3] *See* U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); Wash. Const. art. I § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

[4] *See* U.S. Const. art. III § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); Wash. Const. art. I § 21 ("The right of trial by jury shall remain inviolate."); Wash. Const. art. I § 22 ("In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury.").

before it may affirmatively answer the special verdict, the constitution is not offended.[5] Because the jury unanimously found all elements necessary to convict Davis, the instructions were sufficient here.

CONCLUSION

¶ 47 Finding that any error in admitting testimonial statements from McCottry's emergency 911 call was harmless beyond a reasonable doubt, and that there was no error in the "to convict" instruction, we affirm the Court of Appeals.

ALEXANDER, C.J., C. JOHNSON, MADSEN, BRIDGE, CHAMBERS, OWENS and FAIRHURST, JJ., concur.

SANDERS, J. (dissenting).

¶ 48 The majority is correct that every 911 call must be evaluated on a case-by-case basis to determine whether the contents are testimonial under *Crawford*.[1] Majority at 846, 850. The majority is also correct that logically discrete segments of the 911 call must be analyzed separately.[2] Majority at 851. However, the majority errs when

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[5] In *Mills*, however, we emphasized that while such bifurcation is constitutionally *permissible*, it is not constitutionally *required*. There would have been no constitutional violation had the trial court in the case before us provided a single "to convict" instruction that included the assault element without using the special verdict approach from WPIC 36.54-36.55.

[1] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[2] Given the majority's holding that 911 calls must be evaluated as testimonial on a case-by-case basis and that discrete portions of 911 calls must be analyzed separately to determine if they are testimonial,

(Continued on following page)

it suggests – though it does not *hold* – that a relevant factor is the *subjective intent* of the absent witness to provide information to be used in an accused's prosecution, rather than an *objective* evaluation of whether a reasonable person would know that their statements could be used to prosecute. The majority also errs in its evaluation of the facts of this case. Because I would hold that under the specific circumstances of this case all of Michelle McCottry's statements are testimonial, I dissent.

¶ 49 *Crawford* defined as the "core class of 'testimonial' statements . . . pretrial statements that declarants would *reasonably* expect to be used prosecutorially . . . [and] 'statements that were made under circumstances which would lead an *objective* witness *reasonably* to believe that the statement would be available for use at a later trial.'" *Crawford,* 541 U.S. at 51-52, 124 S.Ct. 1354 (emphasis added). The focus on reasonableness dictates an objective standard, evaluated by whether a reasonable person would "expect [the statement] to be used prosecutorially," not a subjective determination of whether the 911 caller actually knew that his or her statement would be used prosecutorially. Yet the majority focuses on the *lack* of evidence that McCottry "knew" her 911 call would be used to prosecute Adrian Davis.[3]

¶ 50 The proper inquiry, as required by the United States Supreme Court's use of the terms "objective" and

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the majority's generalizations regarding 911 calls (majority at 849-850) are pure dicta.

[3] "However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911." Majority at 850. "There is no evidence McCottry sought to 'bear witness' in contemplation of legal proceedings." Majority at 851.

"reasonably," and as recognized by lower courts and leading commentators who have examined the issue, is whether a reasonable person in the 911 caller's position would know that their statement "is likely to be used in investigation or prosecution of a crime." *People v. Cortes,* 4 Misc.3d 575, 781 N.Y.S.2d 401, 2004 WL 1258018, (citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. PA. L.REV. 1171, 1241 (2002)).

¶ 51 The United States Court of Appeals for the Sixth Circuit stated:

> The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.
>
> *United States v. Cromer,* 389 F.3d 662, 675 (6th Cir.2004).

¶ 52 Objectively, given the extensive media coverage of the use of 911 calls in the prosecution of crimes, the endless police and legal procedural dramas in which such usage plays a key role, and the nature of the questioning that occurs during the call, a reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting the crime.

¶ 53 Professor Richard Friedman, a leading expert on the confrontation clause whose framework for analyzing the clause was adopted by the United States Supreme Court in *Crawford,* stated in his seminal article on 911 calls and the Confrontation Clause: "Now consider statements made

in 911 calls . . . . A reasonable person knows she is speaking to officialdom – either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, *supra,* at 1242.

¶ 54 Even under the circumstances of this case it is clear that a reasonable person in McCottry's position would have known that her 911 call would have resulted in Davis' prosecution and that the information relayed in the call would be used in that prosecution. As the majority notes, Davis was charged with felony violation of a no-contact order under chapter 26.50 RCW. Majority at ___. Under that chapter McCottry would have had to obtain the no-contact order, would have received a copy of that order, and would have been notified at that time of the criminal penalties for violating the order. RCW 26.50.035(1)(c); *see also, e.g., State v. Powers,* 124 Wash.App. 92, 97, 99 P.3d 1262 (2004).

¶ 55 Professor Friedman's most recent post-*Crawford* work sets forth the best reasoned structure for analyzing whether an absent witness's statement is testimonial: "Whether a statement is deemed to be testimonial . . . depends on whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution." Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* http://wwwpersonal.umich.edu/rdfrdman/Grappling1.pdf at 2. It is clear that the 911 call in this case fulfilled the function of transmitting such information.

¶ 56 I agree that in some instances a 911 call that is truly only an "amplified cry for help" might not be testimonial;[4] however, most 911 calls – or at least the great majority of the content of most 911 calls – will not fall into this category. Most 911 calls today are conducted according to a "script" composed and directed by agents for investigating authorities, as was the case here. These "scripts" constitute an interrogation just as effective as if a police officer were questioning the absent witness directly.[5] And *Crawford* held that interrogations by agents of the government, such as police officers, are "testimonial under even a narrow standard." *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354.

¶ 57 As the majority notes, someone at the McCottry residence called 911. State's Ex. 2 (911 tape).[6] The 911 tape does not establish that McCottry herself made the initial call. The 911 operator then called the residence back, and McCottry answered. While McCottry was upset, the

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[4] *See* Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection,* 19 CRIM. JUST., Summer 2004, 4, 10. Professor Friedman actually identified the Court of Appeals opinion in the case at bar as one in which the caller "is fully aware that what she says has potential evidentiary value against the alleged assailant." *Id.*

[5] The Valley Communications Center "Standard Operating Procedures – Policy Number 602: Police Incident Interview Techniques" contained a series of questions that were followed almost exactly by the 911 questioner in this case. Those questions began with what transpired, where the incident occurred, when it occurred, who was involved, where the suspect went, and the circumstance which led to the incident. Br. of Wash. Ass'n of Criminal Def. Lawyers, app. at 1.

[6] The majority opinion assumes the caller was McCottry. Majority at 851. But there is no indication on the 911 tape, or in the testimony of the two officers who were the only trial witnesses, that McCottry was the caller.

majority mischaracterizes the tape when the majority describes McCottry as "hysterical and crying." Majority at 846, 850. In fact, the first sounds heard in the call-back are not those reflected in the official transcript of the tape, but rather McCottry instructing an unknown person to "put [unintelligible] down," and a male voice responding "c'mon baby." Ex. 2.[7] It is a full 10 seconds before McCottry answers the 911 operator's "hello."

¶ 58 During that 10 seconds McCottry does not ask for help. In fact, at no time does McCottry ask for help. In response to the 911 operator's *question* McCottry stated that Davis had been "jumpin' on me again" and had been "usin' his fists." Ex. 2.

¶ 59 This is not the amplified "call for help" that most courts and commentators have identified as potentially "nontestimonial." McCottry's response was no different than if she had been called by the police directly and asked by an officer what had transpired, for example if a

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[7] It is not clear that Davis is the person to whom McCottry was initially talking. During the 911 call McCottry acknowledged that, in addition to three children (Report of Proceedings (RP) at 75), there was also at least one other male in the house she had invited over ("Mike"). Ex. 2; Clerk's Papers (CP) at 2 (Certification). There were at least five persons in the house to whom McCottry might initially have been speaking. Further, according to the Certification for Determination of Probable Cause, McCottry had been arguing with the male friend "Mike" when Davis arrived. CP at 2. "Mike" and Davis drove away together in Mike's car. CP at 2. In addition, McCottry and the officers who responded to the call indicated that McCottry was in the process of moving, perhaps providing context for the instruction to put something or someone down. RP at 76. When the officers arrived, McCottry was alone in the house with the children. RP at 75. "Mike" was not identified in the police report, and was not called to testify at the trial, in spite of the fact that Mike presumably witnessed the events that took place.

neighbor had reported a disturbance. That interrogation would clearly have been testimonial under *Crawford*.

¶ 60 The majority focuses on the fact that the "911 call was part of an ongoing emergency situation." Majority at 850. While this may have relevance to show that the call was potentially an "excited utterance," that inquiry is relevant to whether the call met an exception to the evidentiary rule excluding hearsay, not whether it was testimonial.[8] Certainly a witness reporting an ongoing crime is part of an "ongoing emergency situation." It is nonetheless testimonial. *Cortes*, 4 Misc.3d at 595, 781 N.Y.S.2d 401.

¶ 61 Finally, the majority concludes that "certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. However, the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant." Majority at 851. Putting aside the fact that McCottry never "sought assistance," the majority appears to conclude that everything after the initial identification is testimonial. And presumably the majority's term "initial identification" is shorthand for both the identification and the statement that Davis had hit McCottry, since without the statement

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[8] The United States Supreme Court in *Crawford* explicitly disconnected these inquiries, noting that such indicia of "reliability" are "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Crawford*, 541 U.S. at 62-63, 124 S.Ct. 1354. *Crawford* also questioned whether "spontaneous declarations" – the exception to the hearsay rule, from which the "excited utterance" doctrine was derived, *see State v. Branch*, 182 N.J. 338, 865 A.2d 673 (2005) – which were testimonial would have been admissible in 1791. *Crawford*, 541 U.S. at 58 n. 8, 124 S.Ct. 1354.

there was no proof that Davis assaulted McCottry. But the majority does not explain how the "initial identification," provided in response to structured questioning by a governmental agent, is nontestimonial.

¶ 62 It was not a "cry for help." It was a result of government-initiated interrogation. It was testimonial. Its admission violated the confrontation clause contained in the Sixth Amendment to the United States Constitution.[9] Given that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the tape was not harmless.

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[9] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. While the parties in this case contend only that introduction of the 911 tape violated the federal constitution, we should recall article I, section 22 of the Washington State Constitution ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face.") differs significantly in text and deserves independent consideration when properly raised, as five justices of this court concluded in *State v. Foster*, 135 Wash.2d 441, 473, 481, 957 P.2d 712 (1998).